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A METHODICAL  
SYSTEM  
OF  
Universal Law:

OR, THE  
LAWS *of* NATURE *and* NATIONS  
DEDUCED

From CERTAIN PRINCIPLES, and applied  
to PROPER CASES.

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Written in *Latin* by the CELEBRATED  
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Counsellor of State to the King of PRUSSIA,  
and Professor of PHILOSOPHY at *Hall*.

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TRANSLATED, and illustrated with NOTES and  
SUPPLEMENTS,  
By GEORGE TURNBULL, LL. D.

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To which is added,  
A DISCOURSE upon the NATURE and ORIGIN  
of MORAL and CIVIL LAWS; in which they are deduced,  
by an Analysis of the Human Mind in the experimental Way,  
from our internal Principles and Dispositions.

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*Natura enim juris ab hominis repetenda natura est. Cic.*

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VOL. I.

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M.DCC.LXIII.



A METHODICAL

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# P R E F A C E.

**T**HE author of this system of the law of nature and nations is so well known, and in so high esteem in the republic of letters, that it would be arrogance in me to say any thing in recommendation of his works. Nor need I make any apology for translating into our language so excellent a book upon a subject of such universal importance. For the knowledge of justice and equity must be owned to be necessary in some degree to every one; but to those, in a particular manner, whose birth and fortunes afford them time and means, and call upon them to qualify themselves for the higher stations in civil society. Man, and the rights and duties of man, are certainly the most proper objects of human study in general. And surely Socrates had reason to say, "That if no man can be fit to undertake a trade, how mean and mechanical soever, without having been educated to it, and bestowed some considerable time upon the learning of it, it must be absurd to think one can be qualified for discharging public trusts and duties, without having taken great pains to instruct themselves in the principles of equity, the ends and interests of civil society, and the nature, spirit, and intention of laws." I shall only add, that every science hath its elements; and this treatise at least well deserves to be called an excellent introduction to the science of laws. As for the notes and supplements I have added, how far they are necessary, I must leave it to the reader to judge. The greater part of them relates to one question, viz. The origine of civil government, which hath not been set in its true light by any other writer besides him from whom the illustration of this point is here borrowed. The discourse upon the origin and nature of laws, is an attempt to introduce the

## P R E F A C E.

*experimental way of reasoning into morals, or to deduce human duties from internal principles and dispositions in the human mind. And hence certainly must the virtues belonging to man be deduced: hence certainly must the laws relating to the human nature and state be inferred, as Cicero in his excellent treatise of laws, has long ago told us.—Quid sit homini tributum natura, quantam vim rerum optimarum contineat; cujus muneris colendi, efficiendique causa nati, & in lucem editi sumus, quæ sit conjunctio hominum, & quæ naturalis societas inter ipsos; — his enim explicatis fons legum & juris inveniri potest. i. e. 'Tis by discovering the qualities and powers with which men are endued by nature; and the best ends within human reach; the purposes or offices for which we are fitted and made; and the various bonds by which mankind are knit and united together, and thus prompted to, and formed for society.—'Tis only by discovering and unfolding these important matters, that the source of human rights and duties can be laid open." I have not translated our author's preface; because it is principally designed to shew that the Roman law can now have no other authority in deciding controversies between independent nations or states, than as it is founded upon principles of natural equity; and it is filled up with an enumeration of the titles in the civil law, some have vainly thought sufficient to determine all questions of this kind, which it would have been of very little use to have attempted to english.*

OCTOBER 28.

1740.

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T H E

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THE  
L A W S  
O F

NATURE *and* NATIONS *deduced, &c.*

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BOOK I.  
*Of the* LAW *of* NATURE.

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CHAP. I.  
*Concerning the origine and foundation of the* LAW *of*  
NATURE *and* NATIONS.

Sect. I.

W HATEVER tends to preserve and perfect man is called *good* with respect to man: whatever hath a contrary tendency is called *ill* with regard to him \*: every action therefore which contributes to human preservation and perfection is a *good action*; and every action is *evil* which tends to hurt and destroy man, or to hinder his advancement to the perfection of which his nature is capable.

Sect. II.

Whatever conduces in any manner or degree towards our duration, or the continuance of our present state, is said to be *preservative* of man: whatever promotes and augments those properties, which belonging to human nature, and constituting our state and rank, admits of degrees, is called *perfective* of man \*. Whence it is easy to under-stand

What constitutes a good, and what a bad action?

What preserves and perfects man, and what destroys and imperfects him?

stand what may be said to hurt, wrong, or degrade us.

\* This is the true idea of perfection according to *Simplicius*, who upon *Epictetus Enchir.* cap. 34. observes, to have not only a beginning and a middle, but likewise an end, is the characteristick of *perfection*. So *Aristotle* likewise, in *Meta.* c. 4. 16. where having examined the meaning of several different terms, he reduces them all to the same idea.

### Sect. III.

Men have power to act well or ill.

Such being the nature of human will, that it always desires *good*, and abhors *ill* \*; it cannot but like those actions which tend to our *preservation and perfection*, and it cannot but dislike those actions which tend to our *hurt and imperfection*: But because *good and ill* may be really what they appear to be, and on the other hand, a seeming *good* may be a real *evil*, and a seeming *evil* may be a real *good* \*; it very often happens, that like *Ixion* in the fable, we embrace an empty cloud instead of *Juno*; *i. e.* we are deceived by appearances, and mistake seeming for solid good, and a false semblance of *ill* for real *ill*; and thus we may make a bad or a good choice, be right or wrong in our elections, and consequently in our actions \*.

\* This is observed by *Simplicius* upon *Epictet.* *Enchir.* cap. 34. where he greatly exalts human liberty, and defines it to be that free constitution of the human mind, in consequence of which it voluntarily, and without any constraint, sometimes pursues true, and sometimes imaginary good.

### Sect. IV.

Wherefore men stand in need of some rule by which they may direct their actions.

Now the power of preferring one or other of two possibles, and by consequence of acting well or ill, is called *liberty*: this power we experience; wherefore it cannot be denied that there are, with regard to us, free actions which are good, and free actions which are bad. But since all things, which may be rightly



rightly directed or perverted, stand in need of a rule by which they may be rightly directed, it follows that our free actions ought to be directed by some rule \*.

\* Thus *Epictetus* reasons in *Arrian*, l. 2. c. xi. Do you think all things are right which appear to be such to any one? but how can things, which are directly repugnant to one another, be both right? it is not therefore enough to make a thing right that it appears to some one to be such, since in weighing or measuring things we do not trust to appearances, but apply a standard. For shall there be a certain measure with regard to these things, and none other with respect to our actions besides fancy or appearance? How can it be that there should be no rule, or none which can be ascertained with respect to human conduct, than which nothing is so necessary?

Sect. V.

By a rule here we understand an evident *criterion* And this by which *good and ill* may be certainly distinguished. And in order to answer that end, a rule must be true, right or just, clear, certain and constant. For suppose the rule not to be just, and that which is ruled by it will not be just or right. Suppose it not to be clear and certain, and it cannot be a sure *criterion* of good and evil. Finally, if we suppose it to be uncertain and variable, an action regulated by it will sometimes be good and sometimes be bad: and therefore in none of these cases would it deserve the name of a rule \*.

\* So true is that of *Lucret. de rerum nat. l. 4. v. 515.*

*Si prava est regula prima,  
Normaque si fallax rectis regionibus exit,  
Et libella aliqua si ex parte claudicat hilum:  
Omnia mendose fieri atque obstipa, necessum est,  
Prava, cubantia, prona, supina atque absona tecta,  
Jam ruere ut quædam videantur velle, ruantque,  
Prodita judiciis fallacibus omnia primis.*

Sect. VI.

Further, a rule of action would be but of little advantage to mankind, if it were not of such a kind, that

It must  
likewise  
be obli-  
gatory.



that it carried with it some *motive* (as it is called) by which human will might be impelled to make use of it, and apply it. Because man never acts without something present to his mind, by which he is excited or impelled to act; he will therefore not apply a rule, or at least he will be very indifferent whether he applies it or no, unless he be stimulated by some motive to apply it. But since we call the connection between a motive and a free action *obligation*, that a rule for the direction of human actions may answer its end, it must be *obligatory*.

## Sect. VII.

What is obligation, and how many kinds of it are there?

*Obligation* is a connection between motives and free actions, (§ 6.) and motives must consist either in the intrinsic goodness and pravity of actions themselves, or arise from the will of some Being whose authority we acknowledge, commanding and forbidding certain actions under a penalty. And therefore the former species of *obligation* is called *internal*; the latter is called *external* \*. The first excites to *good actions*, the other to *just actions*. But right is the correlate (as it is called in the schools) to both. For if one person be under an *obligation*, some other person hath a right or title to exact something from him.

## Sect. VIII.

Internal obligation is not sufficient.

Hence it is manifest, that a rule which carries only an *internal obligation* with it, is not sufficient with respect to mankind: for since this obligation solely arises from the goodness of the action, (§ 7), and therefore only excites a person to act by this motive, *viz.* that his action may be good; but man is so framed by nature, that he often embraces a false appearance of good for what is really such \*: (§ 3) Such a rule must be uncertain, and for that reason it is not deserving of being called a rule (§ 5).

\* We

\* We don't deny that the internal is the nobler species of obligation, being that which influences all wise and good men, according to the noted maxim :

*Oderunt peccare boni virtutis amore.*

It is true the ancients praise the primitive race of mankind in the early ages of the world chiefly on this account, that they acted well, and did good and right, without any law compelling them to such conduct, from a virtuous disposition, and with free choice. (*Seneca, Ep. 90.* "The first of mankind, and their progeny, followed the dictates of pure uncorrupted nature as their law and guide." So *Ovid* likewise, *Metam. l. 1. v. 90.* So *Tacitus Ann. 3. 26.* and *Salust. Catil. cap. 9.*) But we deny it to be sufficient to constitute a rule, because we are enquiring after one founded in nature, and common to the good and bad, wise and foolish, in such a manner, that when reason is not able to keep them to their duty, an external obligation, or which comes to the same thing, the fear of suffering may restrain them.

*Ne vaga profiliat frænis natura remotis.*

*Horat. l. 2. Serm. sat. 7. v. 74.*

### Sect. IX.

But if a rule only carrying an *internal obligation* with it, would be uncertain, there is need of one which may produce an *external obligation* arising from the will of some Being whose authority we acknowledge. Since therefore that Being may oblige us to the practice of virtue and honesty, either without co-action, or may command and forbid certain actions with penalties and rewards, the former species of external obligation is properly denominated *imperfect*, and the latter *perfect*. Now the will of a superior commanding and forbidding under penalty is called a *law*: and therefore a rule for the direction of our free actions, to conform to which we are under *perfect obligation*, must consist of *laws*, and a system of such is termed by way of eminence *law* \*.

\* (*Jus*) Law, when it is used to signify a rule of human action, is a system of all the laws of one and the same kind.

kind. (Elem. Inst. § 33.) (*Jus*) Law therefore, 'tis plain from the origine of the word itself, cannot be conceived, without referring it to the will of a superior, and supposing an external obligation. For it is not derived from *Δείον*, as *Menage* would have it, Amœn. Juris. cap. 39. p. 295; nor from *Jove*, as *Scipio*, Gent. Orig. p. 270 has asserted, and after him *Grotius*, Proleg. Jur. belli & pacis, § 12; but from the Word *jubendo*. For instead of *Jura*, the ancients used *jusa* or *jussa*. Festus, *jusa*, *jura*. So Hieron. Magii, var. lect. 4. 1. In like manner, the German word *Recht* is shewn by Jo. Geo. Wachter. Gloss. p. 1251, to include in it *the idea of law*, or the will of a superior directing human actions.

## Sect. X.

Of this  
law there  
can be no  
other au-  
thor but  
God.

Now, since that Being may be justly denominated our superior, upon whom our being and happiness absolutely depend, and whose authority we are obliged to acknowledge, because he has a just title to exact obedience from us, and hath power to propose penalties to us in case of our refusing to obey him; and, it appears by many most evident arguments, that he never hath renounced, nor never can renounce his authority to rule and command us\*: That superior Being whose authority we are obliged to acknowledge, can be no other than the most great and good God; and he therefore is the sole author of that law, which ought, as we have said, to be the rule of action to all mankind.

\* Not only is the *perfection and goodness* of a Being a just title to exact obedience, as is affirmed by *Mos. Amyraldus* Differ. de jure Dei in res creatas, agreeably to that well known saying of *Democritus*: *κύριον τὸ ἀρχεῖν δικαίον τῷ κρείσσειν*. Authority falls by nature to the share of what is best. Stob. Serm. 37. But *dependence* is also such. For who will deny that he hath a just claim to our obedience to whom we owe our existence and preservation? God therefore hath a right to command our submission and obedience: *He in whom we live, move, and have our being*, Acts 17. 28. Besides, that he can inflict punishments on the disobedient and rebellious, his omnipotence and justice leave

no room to doubt. (Elem. phil. mor. § 185 & seq.) Finally, if he had, or should ever renounce his authority over men, and all created beings, that would be unworthy of his wisdom and goodness; because, being infinitely wise, he must know that we would be most miserable without his government and rule, and being infinitely good, he cannot abandon his creature, which cannot guide itself, and so expose it to the greatest misery. But what is repugnant to his wisdom and goodness, that he can neither will nor do, it is allowed. Wherefore, he neither will nor can renounce his supreme jurisdiction over men and all creatures. It is proper to observe this in opposition to the celebrated Leibnitz, who, the illustrious Sam. a Cocceis, Differ. de principio juris naturalis unico vero adæquato, published at Francf. 1699, having by solid arguments demonstrated that there can be no other principle of natural law but the will of God, in the 1700, Ephemeridibus Hanoveranis for the month of July, objected against that hypothesis, among other things, "That according to it, if we suppose a creature to have so much power, that being once produced by its creator, it could not be compelled by him; such a creature must be considered as manumitted by its creator, in the same manner as children, when they come to such a degree of power, that they cannot be compelled by their parents." For to suppose such a case, is the wildest extravagance, since it implies a manifest contradiction, to imagine a finite Creature arrived to such power that it can no longer be compelled by its Creator, an infinitely powerful Being. And no less absurd are all the other fictions he puts, in order to invalidate that learned man's doctrine, as this for instance, "That if we suppose an evil genius to have supreme uncontrollable power, such an evil genius would not, because irresistible, cease to be wicked, unjust and tyrannical." For we cannot suppose an evil genius to have supreme power, if we believe the divine existence. And if we deny the existence of God, it is absurd to suppose an evil genius, or indeed any created thing to exist. It is a strong argument of truth, when a proposition cannot be overturned but by suppositions which include a manifest contradiction.

Sect. XI.

Because we are enquiring, as appears from what hath been said, for no other rule of right but what <sup>This law is made known to</sup> God



mankind  
in no o-  
ther way  
but by  
reason.

God hath given to the whole human race for the rule of their conduct, (§ 10) hence it follows that this rule must be intelligible to all mankind. But since what is intelligible to, or may be known by all mankind, must be discovered to them either by a divine revelation, which all men acknowledge and receive as such, or must be discoverable by the use of natural reason; because such a revelation as hath been mentioned never existed: it is obvious that the law of nature must mean laws within the discovery of all mankind by the use of reason common to all mankind, and which therefore are by nature promulgated to all mankind \*.

\* Hence Cicero in his oration for Milo, c. 4. calls it *Jus non scriptum sed natum*. "Law, or a rule of rectitude not written but congenial; a rule which we have not learned, read, received by tradition, but which nature itself hath impressed upon us, and which we imbibe and draw from it; to the knowledge of which we are not formed and trained by education or example, but we are originally tinged and stamped with it." So the apostle likewise says, "The Gentiles, which have not the law, are a law unto themselves, which shew the works of the law written in their hearts." This cannot be otherwise than by reasoning; and therefore by the right use of reason: this is the unanimous doctrine of all, who have, as it were, by compact, placed the law of nature in the *dictates of right reason*; a few only excepted, who have maintained there is nothing just or right by nature, as *Archelaus* in *Laertius*, 2. 16. *Aristippus*, according to the same writer, 2. 93. *Carneades* in *Laetantius*, Instit. divin. c. 14. & 19; *Pyrrho* in *Sextus Empyricus*, Hypot. 3. 24. and to those *Aristotle* may be added, who, as *Menage* has proved at the 7. 128. p. 311. of *Laertius*, was not far from that opinion.

A defini-  
tion of the  
law of na-  
ture and  
of jurif-  
prudence,  
natural or  
divine.

#### Sect. XII.

The law of nature, or the natural rule of rectitude, is a system of laws promulgated by the eternal God to the whole human race by reason. But if you would rather consider it as a science, natural



tural morality will be rightly defined the practical habit of discovering the will of the supreme legislator by reason, and of applying it as a rule to every particular case that occurs. Now, because it consists in deducing and applying a rule coming from God, it may be justly called *divine jurisprudence*.

Sect. XIII.

Since the law of nature is a system of laws (§ 12) whatever properly belongs to laws may be ascribed to the law of nature, as to prohibit, permit, punish \*. It may be divided as a body of laws is by the *Roman* lawyers into the permissive part, which obliges all men not to disturb any person in the use and exercise of his right and liberty; and the preceptive, which obliges all men to do good actions, and to abstain from bad ones; and it is also evident, that with respect to the preceptive part, there is no liberty left to mankind; whereas, with regard to the permissive, any one may renounce his right to what is permitted to him \*. The law of nature may be divided into preceptive and permissive.

\* The permissive part of the law of nature constitutes therefore a rule: The preceptive makes an exception. For God leaves all to human liberty, which he hath neither commanded nor forbid. Thus, *e. g.* God having only prohibited our first parents the tree of knowledge of good and evil, they had good reason to infer that they were permitted to eat of all the other fruits, Gen. iii. 2, 3. Where no obligation of law takes place, there liberty is entire. But hence it must not be concluded, that a permissive law carries no obligation with it. For it obliges all mankind not to disturb any one in the use of his liberty. Thus, *e. g.* because God has permitted every one to appropriate to his use whatever is not yet appropriated by any person, or belongs to none, and thus to constitute dominion and property, theft, rapine, fraud, depredation, &c. cannot but be unlawful and unjust.

Sect.

## Sect. XIV.

Whether  
would  
there be a  
law of na-  
ture if  
there were  
no God?

Now seeing the law of nature comes from God (§ 12) as the supreme legislator, it follows by consequence, that tho' a person may do a good action, without any regard to the law of nature as such, being excited to it by the internal goodness or obligation of the action, and by his good disposition; tho' even an atheist, who hath no sense of religion, may do a good action thro' the influence and guidance of his reason, because he knows it to be good in itself, and advantageous to him; yet such a person cannot on that account be said to act *justly*, *i. e.* conformably to the law of nature considered as such; much less then can it be said, that there would still be a law of nature \*, tho' it should be granted, which cannot be done without impiety, that there were no God, or that God did not take any care of human affairs. See *Grotius* proleg. jur. belli & pacis, § xi.

\* They cut the nerves, so to speak, of the law of nature, who conceive or define it independently of all regard to God, and thus feign a law to themselves without a law-giver. All who have philosophized about it with accuracy as well as religiously, have acknowledged, that it proceeds from God as its founder and author, and that if the divine existence be denied, there remains no difference between just and unjust. God, in order to incite Abraham to the love and practice of justice, says to him, "I am the Almighty God, walk before me, and be thou perfect, *Gen.* xvii. 1. And the Apostle, *Heb.* xi. 6. says, "He that cometh to God must believe that he is, and that he is a rewarder of them that diligently seek him." Yea Cicero, de Nat. Deorum, l. 2. says, "I don't know whether piety towards God being removed, all sociality and fidelity among men, and justice, the most excellent of virtues, would not likewise be destroyed."

Why it is  
said to be  
inscribed  
on our  
hearts.

## Sect. XV.

Since the rule of rectitude we are now speaking of signifies laws promulgated by right reason, and

(§ 12) and reason is nothing else but the faculty of reasoning, or of inferring one truth from others by necessary consequence \*, it is therefore plain why the apostle affirms that the knowledge of this rule is *engraved on our hearts*, Rom. ii. 15. For he attributes to man the power or faculty of reasoning concerning just and unjust; which power, since it does not necessarily include in it actual exercise, why some should ascribe even to infants a certain innate sense of just and unjust, is not difficult to be comprehended.

\* Grotius insists much on the emphasis of this phrase, Grot. upon the Epistle to the *Romans*, ii. 15. and Joan. Clericus Art. Crit. part. 2. sect. 1. cap. 4. §. 10. who maintain that it means no more than that the law of nature may be easily discovered and retained without the assistance of a teacher, and they have accumulated several passages of ancient authors in which *εἰς τὸν νοῦν* signifies nothing else. But this subject has been fully treated by Jo. Franc. Bud. Inst. Theo. mor. part. 2. c. 2. § 5. where he has also examined Mr. Locke's opinion with great accuracy.

Sect. XVI.

Hence it follows that the law of nature is not derived from the sacred writings, nor from any divine positive laws, such as the seven precepts given to *Noah*, of which the *Jews* boast so much \*; tho' at the same time we readily grant, that the author of reason and revelation being the same, not only many things which reason dictates are to be found in the sacred writings, but there is every where a perfect harmony between them; nor can there indeed be any thing forbidden or commanded in the sacred oracles which is repugnant to the rule of right discoverable by reason.

Whether the knowledge of it is derived from the sacred writings or tradition?

\* How the Hebrews derive the law of nature and nations from the seven precepts given to *Noah*, is shewn by Jo. Selden, de jure nat. & gent. secundum discipl. Hebræorum. But tho' the learned Budæus Introd. ad philosoph.

Heb.

Heb. p. 14. and 15, thinks that tradition concerning the seven precepts given to Noah, does not want some foundation; yet it cannot be now proved, that ever any such precepts were given to Noah, and tho' some things that were commanded or forbidden by these precepts be now known to the posterity of Noah; they are known to them not by tradition but by reason, and therefore they are not positive laws, but laws promulgated by right reason.

## Sect. XVII.

The law  
of nature  
is immu-  
table.

Further, from the same principle it is evident that the law of nature is no less immutable than right reason it self, which cannot but remain unchangeably the same: and therefore God, who cannot do any thing contrary to his will, cannot give any indulgence repugnant to that eternal law in any respect; and much less can any among mortals arrogate to himself any power over that law \*.

\* *Cicero* says elegantly, The law of nature cannot be altered, nothing can be derogated from it, much less can it be totally abrogated. We cannot be discharged from it by the senate or by the people; neither are we to look out for any explainer or interpreter of this law, besides reason itself. There is not one law of equity for *Rome*, another for *Athens*; one for former and another for present times, but the same law binds all nations at all times. All men have one common universal Lord, Ruler, and Lawgiver, God the founder, the establisher of reason, and the judge of all reasonable Beings. To this *Ulpian* consents as we have shewn elsewhere. *L. 6. pr. D. de just. & jure.*

## Sect. XVIII.

The dif-  
ference  
between  
the law of  
nature and  
civil law.

Nor will it now be difficult to find out the difference between the law of nature and civil law. For the former is discovered by right reason, the latter is promulgated and made known either *viva voce* or by writing. The former extends as far as right reason: the other is the law of a particular state: The former hath for its object all actions internal as well as external, which are by nature good or evil: The other respects indifferent and external



ternal actions, so far only as the good of any people or state requires their regulation and adjustment \*.

\* *Cicero de Invent. l. 38.* "All laws ought to be referred to the publick interest of the state, and to be interpreted not according to the letter, but as the end of laws, publick good, requires. Such was the wisdom and virtue of our ancestors, that they proposed no other end to themselves in making laws but the safety and happiness of the state: they either never enacted into laws what was hurtful, or if they happened to do so, such a law was no sooner known to be hurtful than it was abolished. No person desires the observation of laws for their own sake, but for the good of the republick." They are therefore much mistaken who will have what they call *natural law* to be founded merely on interest, according to that saying of *Epicurus*,

*Non natura potest justo discernere iniquum,*

*Sola est utilitas justī prope mater & æqui.* Hor. Ser. l. 3.

It is true God being infinitely wise and good commands nothing by the law of nature, but what is useful; but he does not command it because it is useful, but because it is agreeable to his nature and will. An action is not just because it is advantageous, but it is advantageous because it is just. For, as was nobly said by *Mar. Ant. Imp. l. 7. 74.* "Every action agreeable to nature is advantage or interest." But this error hath been sufficiently refuted by *Grotius, Prolog. jur. bell. & pac. § 16.* *Puffendorff de jur. nat. & gent. L. 2, 3, 10, 11.* and the illustrious *Sam. de Coccei, de princip. jur. nat. & gent. § 2, 9.*

### Sect. XIX.

But notwithstanding this difference, it is beyond The all doubt, that the knowledge of the law of nature must be of the greatest use to all who apply themselves to the study of the civil law; because many of its precepts are adopted by civil law, and by it are fortified with additional penalties\*; several conclusions are drawn from the law of nature by civil law; and natural equity must never be severed from civil law, lest according to the ancient saying, *Strict law become severe injustice.* Summum jus summa injuria.

Sect.



## Sect. XX.

The brutes are not governed by the law of nature. Moreover from the same principle it is visible, that no other creatures besides men are subject to this law; since God hath dignified man alone with the prerogative of reason; and therefore that definition of *Ulpian* is false. Natural law is a law which nature hath taught all animals. *L. 1. § 3. Dig. de just. & jure* \*.

\* This is observed by *Hesiod* in that celebrated passage of his book, *Opes. & Dies*. v. 274. Τὶνδ' ἔγαν, &c. The meaning of which is, Brute animals devour one another, because they have no idea of justice, but to men nature hath given a sense of justice, which far exalts them above the brute creation. *Jac. Cujacius* hath not removed the difficulty in his notes *ad Inst.* p. 8. tom. I. by saying, "What the brutes do by a natural impulse, if men do the same by reason, they act according to the law of nations." For thus an action will not be agreeable to the law of nature and nations merely because brute animals do the same, but because it is acting by the direction of right reason.

## Sect. XXI.

What is called the law of nations? Further, since the law of nature comprehends all the laws promulgated to mankind by right reason; and men may be considered either as particulars singly, or as they are united in certain political bodies or societies; we call that law, by which the actions of particulars ought to be governed, *the law of nature*, and we call that *the law of nations*, which determines what is just and unjust in society or between societies. And therefore the precepts, the laws of both are the same; nay, the *law of nations* is the law of nature it self, respecting or applied to social life and the affairs of societies and independent states \*.

\* The law of nature is therefore of a larger extent than the law of nations; for there is nothing dictated or prescribed by right reason, to which every particular is not obliged

obliged in some manner to conform himself. But there are certain parts of the law of nature, which cannot so properly be applied to whole societies, *e. g.* The laws and rights belonging to matrimony, paternal power, &c.

Sect. XXII.

Hence we may infer, that the law of nature doth not differ from the law of nations, neither in respect of its foundation and first principles, nor of its rules, but solely with regard to its object. Wherefore their opinion is groundless, who speak of, I know not what, law of nations distinct from the law of nature. The positive or secondary law of nations devised by certain ancients, does not properly belong to that law of nations we are now to treat of, because it is neither established by God, nor promulgated by right reason; it is neither common to all mankind nor unchangeable \*.

Whether it be different from the law of nature?

\* Many things which are referred to the positive law of nations, arise either from the law of nature itself, or from customs, or from some certain law common to many nations. Thus the rights of ambassadors, for the greater part, are deducible from the law of nature. Many things were observed among the *Greeks*, which barbarous nations payed no regard to, *v. g.* giving a truce to the vanquished to carry off their killed. The manners and customs of the *Germans* became afterwards common almost to all nations, as *Grotius* has observed, *de jure belli & pacis*, 2. 8. 1. 2. In fine, even among christian customs, some have so far fallen into desuetude, that there is no remaining vestige of them. *Leibnitz*, *præfat. Cod. jure gent. dipl.* p. 8. who observes, that many things established by the pope of *Rome* as head of the christian state, are held for the common law of christian nations. This *Hertius & Puffend. de jure nat. & gentium*, l. 2. c. 3. § 23. illustrates by an example, from the use of cross-bows against christians.

Sect. XXIII.

It will not therefore be an useless attempt to treat of both these laws, which have the same foundation

This work divided into two parts.

in the same work, in such a manner however, as carefully to distinguish the one from the other, since they differ from one another in respect of their objects and application. We shall therefore handle them separately in this order; in the first book, we shall enquire into the law of nature; and in the second, into the law of nations.

#### REMARKS on this chapter.

Tho' our Author proceeds more distinctly and methodically than most other writers on the law of nature and nations, yet some steps of the reasoning of this chapter do not intirely satisfy me. For § 8. he reasons thus, "A rule carrying along with it no more than *internal obligation* would be uncertain, and so would not deserve the name of a rule; because internal obligation only means the intrinsic goodness of an action, but man is so framed that he may mistake seeming for real good."— Whence he concludes § 9. "That no rule can be certain, and thus sufficient for our direction, but that which carries along with it "an external obligation, *i. e.* according to his definition, the "command of a superior invested with sufficient power to enforce "his commands." Now it is plain, that the command of God to do, or to forbear an action can only be inferred from the intrinsic goodness or pravity of that action, *i. e.* in our author's language, the external obligation of an action can only be inferred from its internal obligation. Our author acknowledges this § 5, and afterwards § 60, and § 77, & *seq.* But this being true, it evidently follows, That we cannot be more certain about the external obligation of an action, than we are about its internal obligation: whatever uncertainty our apprehensions of the latter are liable to, our apprehensions of the former must be liable to the same uncertainty. It appears to me very odd reasoning to say, That considering how obnoxious men are to mistakes about good and evil, there must be a more certain rule for human conduct than the intrinsic goodness of actions, even the divine will; when at the same time we are told, that we cannot come at the knowledge of the divine will with respect to our conduct, otherwise than by first knowing what an action is in itself; or that we can only infer the divine will concerning an action from its intrinsic nature, its intrinsic goodness or pravity. In order to cut off many verbal disputes, with which the moral science hath been hitherto perplexed in its very first steps, it ought in my opinion to set out in this manner. 1. If there be such a thing as good or evil belonging to, or arising from actions, there is an internal obligation or a sufficient reason to choose the one and to abhor the other. But that some actions are good and others evil, must be true if preservation and destruction, pain and

and pleasure, happiness and misery, perfection and imperfection, be not words without meaning, which will not be said. This is the substance of what our author says in his first section, and thus the better antients deduced and explained the essential differences of actions, or the natural difference betwixt virtue and vice. See my *Principles of moral and christian philosophy*. T. 1. c. 5. t. 2. § 3. introduction. In other words, if there be any such thing as natural good and evil, there must be moral good and evil; for actions tending to good must be good, and actions tending to evil must be evil; or if there be any such thing as perfection and imperfection with respect to any quality, any being, as a vine, a horse, &c. there must likewise be such a thing as perfection and imperfection with respect to moral powers and moral agents and their acts or exertions. 2. If there be a God, he must will that we should regulate our actions by, and act conformably to the internal obligation of actions. But that there is a God is the universal plain language of nature. 3. Wherefore wherever there is internal obligation to act in such or such a manner, there is likewise an external obligation to act in the same manner, *i. e.* there is an extrinsic reason for acting so, arising from the will of God, who is infinitely perfect, and upon whom all our interests here and hereafter absolutely depend. 4. Whatever therefore in respect of its internal obligation may be called a proper rule of conduct, is at the same time a *law*, in the proper and strict sense of the word, *i. e.* it is the will, the command of a superior who hath right to command, and power to enforce the obedience of his commands, being the will of God the creator. 5. A system of rules or of directions for our conduct, having internal obligation, may be properly called a system of laws, of natural laws, of divine laws, because it is a system of precepts discoverable from their natural fitness, or internal obligation to be the will or laws of God concerning our conduct. And therefore the whole enquiry into rules of moral conduct, may be called an enquiry into the natural laws of God concerning our conduct.

It is not properly the business of such an enquiry to prove the being of a God, and that where there is internal obligation to an action, there must also be external obligation to it. It supposes that done, and proceeds to enquire into internal obligations; or to unfold the goodness and pravity of actions, and from hence to deduce general rules or laws of conduct. Now if the preceding propositions be attended to, and the difference between a rule and a law, or between internal and external obligation, according to our author's definition, be kept in mind; it may be asserted without any ambiguity, that abstractly from all consideration of the will of the supreme Being, there is no law for our conduct; there is a rule, but that rule is not a law, in the strict sense of that word. It would have prevented much jangling about the foundations of morality, if writers had carefully distinguished, with a late excellent writer, *Dr. Sykes*, in his



*Essay on the Connexion of Natural with Revealed Religion,*  
between the law and the sanction of the law. cap. 2.

Our author's reasoning will proceed very clearly, if we understand the meaning of his 8 § to be to this purpose. "A rule of conduct while it is merely apprehended under the notion of reasonable, will not be sufficient to influence men; in order to have due influence upon them, it must be considered as having external, as well as internal obligation, arising from the will of God which never changes." See how Puffendorf reasons, b. 2. of the law of nature and nations, ch. 3. § 20. "But to make these dictates of reason obtain the dignity and power of laws, it is necessary to call into our consideration a much higher principle, &c."

With respect to what is said, § 22. of the law of nations, 'tis well worth while to add an excellent remark of the author of the *Persian Letters*, 94 and 95. "As the law of nature and nations is commonly doctored, one would imagine there were two sorts of justice; one to regulate the affairs of private persons, which prevails in the civil law; the other to compose the differences that arise between people and people, which plays the tyrant in the law of nations: as if the law of nations were not itself a civil law, not indeed of a particular country, but of the world. The magistrate ought to do justice between citizen and citizen; every nation ought to do the same between themselves and another nation. This second distribution of justice, requires no maxims but what are used in the first. Between nation and nation, there is seldom any want of a third to be umpire; because the grounds of dispute are almost always clear and easy to be determined. The interests of two nations are generally so far separated, that it requires nothing but to be a lover of justice to find it out: it is not the same with regard to the differences that arise between private persons as they live in society, their interests are so mingled and confounded, and there are so many different sorts of them, that it is necessary for a third person to untangle what the covetousness of the parties strives to tie knots in, &c."

## CHAP. II.

*Concerning the nature and distinguishing qualities or characteristics of human actions.*

### SECT. XXIV.

Transi-  
on to treat  
of human  
actions.

FROM what hath been said of the foundation and origine of the law of nature and nations, it is obvious, that it hath for its object and scope

scope the direction of human conduct; and therefore order makes it necessary to enquire accurately into the qualities and characteristics of human actions.

Sect. XXV.

Experience, the fountain of all knowledge, teaches us, that various motions and changes happen in the human mind; but since no motion can be produced or conceived without a sufficient moving cause, the motions which happen in the mind of man must have some sufficient cause, which must either be *within* or *without* man. And therefore motions, the sufficient cause of which is in man himself, are called *actions*; and those the cause of which must be sought after without man, are termed *passions*. But because the motion called *action*, either produces nothing without the mind, but rests there, or produces by will some effect in the body, the former are denominated *internal*, the latter *external actions*.

Sect. XXVI.

Passions not proceeding from us, but from some external cause, are so far without our power, and therefore are not unfrequently excited in us against our will or inclination; yet they may sometimes be as it were repulsed and prevented, if we are provided with sufficient force to resist the external exciting cause; and on the other hand, in certain circumstances we can assist the external mover, so as that the motion it tends to produce may be more easily excited in us. Whence it follows that some passions are within our power, and others are not \*.

\* All this may be illustrated by clear examples. To be warmed is a passion; sometimes we cannot avoid it, as when we are making a journey in very warm air: sometimes we can, as when in winter we remove farther from the fire: and sometimes we can as it were assist the cause,

as by drawing nearer to a fire that we may become warmer. To be warmed is therefore sometimes in our power, and sometimes without our power.

## Sect. XXVII.

Whether  
they are  
subject to  
our direc-  
tion or  
not?

Because the law of nature hath only free actions for its object, (§ 4.) it cannot have for its object, in order to be directed by it, passions which are not within our power. Tho' it may lay down some rules relative to our passions, so far as they are in our power, yet, properly speaking, these rules are not directions to our passions, but to those free actions, by which we can resist or assist these passions, shewing what we ought to do with regard to hindering or forwarding them \*.

\* Thus laws cannot be prescribed to the passion of anger, but reason can give rules to our free actions, and directs us not to give loose reins to anger, but to resist its first motions, least it should become impetuous and ungovernable, and to forbear acting while the mind is in too great a ferment and perturbation, &c. Who will deny that he acts contrary to the law of reason who does not observe these rules? Nothing can be more true than what Cicero says, *Tusc. qu. l. 3.* "All the diseases and disturbances of the mind proceed from the neglect or despight of reason, i. e. from not observing those prescriptions which reason dictates to us for hindering the mind from being overpowered by violent commotions."

## Sect. XXVIII.

Whether  
the law of  
nature ex-  
tends to  
them?

The law of nature therefore only extends to our actions; but let it be observed, that tho' the sufficient cause of all these be in man himself, (§ 25.) yet experience teaches us, that of some actions we are conscious and are absolute masters; others are of such a nature that they proceed from some mechanical disposition, in such a manner that we are not always conscious of them, nor have them not wholly in our power \*.

\* Thus

\* Thus it is in our power to sit, stand, or walk; to be silent or speak, to give or not give, &c. as we will. And of all these actions we are conscious when we perform them; but, on the other hand, the playing of the lungs, the peristaltic motion of the intestines, the circulation of the blood, &c. do not depend on us; they are motions which we often neither feel nor know to be performed in us. The Stoicks use that distinction somewhat differently when they assert that some things are *τὰ ἐφ' ἡμῖν*, within our power; and others are *τὰ ἐκ ἐφ' ἡμῖν*, without our power. To the former class they refer opinion, appetite, desire, aversion, in one word, all our actions; to the other they refer bodily goods, possessions, glory, power, and whatever in fine is not our own acquisition or work. Epict. Enchirid. c. i. Their division is therefore a distribution of things, and not of actions only.

Sect. XXIX.

Actions of which we are conscious, and which Actions are within our power, and subject to our direction, are either properly termed *human* or *moral* actions; those human or natural. of which we are not conscious, or not masters, Whether are called *physical* or *natural* actions; whence it is the latter plain, that the former are *free*, the latter *neces-* are the *sary*; and therefore that *human* or *moral* actions object of the law of nature? alone can be directed by the law of nature (§ 4.), and not natural ones, except so far as it is in our power to assist and promote, or contrariwise to avoid and prevent them \*.

\* Tho', as we have just now observed, we have no command over the circulation of our blood, the motion of the heart, &c. yet it is plain from experience that we can assist those motions by temperance and medicines; and that we can disturb them by intemperance, or put a period to them by poison, the sword, and other methods. Who therefore can doubt, but the law of nature may prohibit whatever tends to disturb or destroy these natural motions, and with them life itself? The ancient philosophers have agreed to this truth. For tho' some have commended self-murder as noble and heroic; yet *Democritus* elegantly says in *Plutarch de sanitate tuenda*, p. 135. "If the body should



“ bring an action of damage against the soul, for an injury  
 “ done to it, it could not escape condemnation.”

## Sect. XXX.

The understanding and will are the principles of human actions.

Human or moral actions being free or within our power, and every thing being in our power which is directed by our will; it follows that human or moral actions are actions which may be directed by our will. But because the will never determines itself, unless it be excited to desire or reject by the understanding\*; hence it is justly concluded, that the understanding likewise concurs in the exertion of free human actions; and therefore there are two principles of free human or moral actions: the *understanding* and the *will*.

\* The will hath good or evil for its object, and therefore it always tends towards good, and flies from evil. Whence it is plain, it cannot choose but what is represented to it by the understanding, under the appearance of good, just, or advantageous; nor reject but what is exhibited to it under the semblance of evil, unjust, or hurtful. So Simplicius upon Epictetus, cap. I. “ But it is certain  
 “ that the acts of the willing power, are preceded by some  
 “ judgment or opinion. If an object be represented to the  
 “ mind as good or evil, propensity or aversion are excited,  
 “ and appetite or desire succeeds. For before we desire any  
 “ agreeable object and embrace it, or fly from any thing  
 “ contrary to what is desirable, the mind must necessarily be previously prone or averse towards it.”

## Sect. XXXI.

What the understanding is?

*Understanding* is the faculty by which the mind perceives, judges, and reasons. When this faculty takes the name of *imagination*, we have sufficiently shewn in another treatise. (*in the elements of rational philosophy.*)

Without its concurrence an action is not moral.

## Sect. XXXII.

But since the will cannot exert itself, unless it be excited by the understanding, (§ 30.) it follows that

that it cannot prefer a just action as such, nor abhor an unjust one as such, unless the understanding hath first distinctly perceived the action to be just or unjust, by comparing it with the rule of action, i. e. by reasoning. And therefore moral actions presuppose the capacity of perceiving a rule of action, and of comparing actions with the ideas of just and unjust \*.

\* Hence it is manifest that the law of nature does not extend to infants incapable of discerning good from evil; much less to the actions of mad persons, changelings, or such as are disordered in their judgments by any disease; because such cannot reason about just and unjust. Aristotle therefore justly observes, *Ethic. c. 34.* “ With respect to things of which ignorance is the cause, man is not unjust. For in the case of inevitable ignorance, one is as an infant that beats its father without knowing what it does. On account of this natural ignorance children are not reckoned unjust. Whenever ignorance is the cause of acting, and one is not the cause of his ignorance, men are not to be deemed culpable or unjust.”

### Sect. XXXIII.

That faculty by which we reason about the good- Hence  
ness or pravity of our actions is called *conscience*, <sup>con-</sup>  
conscience. concerning which we have discoursed at large in  
another treatise. Here however it is necessary to  
repeat, or rather add some observations upon con-  
science.

### Sect. XXXIV.

Because conscience reasons concerning the good- Which is  
ness and pravity of actions; (§33) but actions are <sup>reasoning.</sup>  
called just, in respect of an external obligation arising from a law; conscience must therefore compare the one with the other, the law and the fact; that is, form two propositions, and from them deduce a third; which, since it cannot be done but by syllogism, it follows that every reasoning of  
C 4 conscience

conscience is a fyllogism, consisting of three propositions, the law, the action, and the conclusion.

\* Such was that reasoning of Judas's conscience, Mat. xxvii. 4. "I have sinned in that I betrayed innocent blood." In which the first proposition expresses a law, the second Judas's action, and the last the conclusion or sentence of his conscience. Nor does any thing else pass in our mind when conscience reasons within us. It is therefore most wickedly misrepresented by Toland and others, as an empty name, made a bug-bear by priests.

## Sect. XXXV.

It is divided into good and evil conscience.

Since conscience in its reasonings always terminates in a sentence which it draws (§ 34): but every sentence either condemns or absolves according as the action is found to be conformable or disagreeable to the law. Conscience, when it absolves, is called *good*, and when it condemns, it is called *evil*; the former is attended with tranquillity and confidence; the latter with suspiciousness and dread.

\* Hence St. Paul, *Rom. ii. 15.* calls the acts of conscience λογισμὸς, &c. thoughts excusing or accusing; and St. John, 1 Ep. iii. 21. says, if our hearts condemn us not, then have we confidence towards God, &c. So speak the Poets likewise,

*Prima hæc est ultio, quod, se  
Judice, nemo nocens absolvitur: improba quamvis  
Gratia fallaci Prætoris vicerit urna.*

Juv. Sat. 13.

## Sect. XXXVI.

We may reason either about past or future actions, and therefore conscience reasoning about actions not yet performed, is called *antecedent conscience*, and when it reasons about actions already done, it is called *consequent conscience*.

It is likewise divided into antecedent and consequent.

In some persons both are found.

## Sect. XXXVII.

In both cases conscience compares the action with the law. But because the good and upright man, who

who hath a due sense of virtue and duty alone sets himself to conform his future actions to the divine law; such only exercise antecedent conscience. The consequent exerts itself even in the breasts of the most profligate.

\* Virtue is always united with an earnest indefatigable care to understand the divine law. The greater progress one has made in virtue, the more ardent is this desire in his breast. And hence it is, that rightly disposed minds are strict inspectors into the nature even of those actions which appear trivial and indifferent to others; for which reason, their conscience is said to be tender and delicate. Plutarch says elegantly, *de profectu virt. sent. p. 85.* "Let this likewise be added, if you please, as a mark of no small moment, that he who is making proficiency in virtue, looks upon no sin as venial, but carefully shuns and avoids every appearance of evil."

Sect. XXXVIII.

Further, as often as we compare a future action with the law, we find it either to be commanded, forbidden, or permitted. In the first case conscience excites us to perform the action. In the second it restrains us from it. In the third, having wisely examined all its circumstances, it advises what ought to be done. Conscience is therefore divided into exciting, restraining, and admonishing.

\* Thus conscience excited Moses and Zippora to circumcise their son, recalling to their mind the divine precept about circumcision, *Exod. iv. 24.* Conscience restrained David from perpetrating his intended murder of Nabal, setting before him the divine command, "Thou shalt not kill." *1 Sam. xxv. 32.* Finally, conscience admonished St. Paul not to eat meat which he knew had been consecrated to idols, and to give the same counsel to the Corinthians. For tho' he knew that christians could not be defiled by meats and drinks; yet his conscience advised him to act prudently, lest he should give offence to any one, *1 Cor. x. 28.* and hence his golden maxim: "All things



things are lawful to me, but all things are not expedient :  
all things are lawful, but all things edify not."

## Sect. XXXIX.

Con-  
science is  
either  
right or  
erroneous.

Moreover, because conscience is a reasoning, the same things agree to it which are true of a syllogism ; wherefore as reasoning, so conscience may be either *right* or *erroneous* ; and as every reasoning is either faulty in the *form* or in the *matter*, so conscience errs, either because the law, or because the action is not rightly represented ; or because the rules of just reasoning are not observed.

\* To illustrate this by examples. The Jews erred in the *matter*, when they thought they could without sin withhold from their parents what was due to them, provided they devoted it to God. For the *major*, in their reasoning, set forth a *false law*. " But ye say, whosoever shall say to his father or his mother, it is a gift by whatsoever thou mightest be profited by me." *Mat.* xv. 5. So likewise Abimelech, when he imagined he could innocently take Sarah into his bed. For he made a false state of the fact, imagining he was to lie with an unmarried woman, *Gen.* xx. 2. To conclude, the Pharisees erred in the *form*, when they inferred from the law relative to the sabbath, this false conclusion, that no work of necessity and mercy was to be done on it. *Mat.* xii. 10.

## Sect. XL.

It is either  
certain or  
probable.

Again, as in other reasonings, so likewise in those of conscience chiefly, it happens that an argument is sometimes taken from a certain principle, and sometimes from an hypothesis, a probable proposition, but yet merely hypothetical. Hence conscience is called *certain*, when it argues upon an indisputable law ; and *probable*, when it founds upon the probable opinion of others \*. Now, because there are various degrees of probability, conscience must sometimes be more, and sometimes less probable.

\* Probable

\* Probable conscience must not therefore be opposed to right conscience, because probable conscience may be right. But it may be false; for as in reasoning we may be deceived by a specious shew of certainty, and mistake a *paralogism* for a demonstration; so we are much more liable to have a false appearance of probability put upon us by *sophisms*: whence we see the slipperiness of that doctrine maintained by certain modern casuists concerning the sufficiency of *probable conscience*, to exculpate from sin, of which see Lud. Montalt. Litt. ad provincial. Ep. 5. and Sam. Rachel. Differ. de *probabilismo*. For unless we admit a rule which is a mere *proteus* to be a good one: We cannot possibly imagine we have done our duty, if we take probable conscience for our guide, which is neither always right, nor certain, nor constant (§ 5): especially, since these doctors measure probability by the opinions of others; whereas the apostle forbids us to trust to the judgment of others in matters of so great moment. "Let every man be fully persuaded in his own mind." *Rom. xiv. 5.*

## Sect. XLI.

Because what is probable may be true, or may be false (§ 40): therefore it happens that probable arguments present themselves to us on both sides of the question; now in this case we think more deliberation is required, the affair being dubious; and conscience is then said to be *doubtful*; but if the perplexity we are in, and cannot get totally rid of, be of smaller consequence, it is then called *scrupulous* \*.

\* That doubting of the mind, which suspends it between two opinions, is not improperly called by the learned Wolfius *Scrupulus*: - But our definition seems more agreeable to the primitive meaning of the word. For *Scrupulus* signifies a very small pebble, which yet getting into the shoe creates no small pain. So Servius explains it, ad *Æn. 6. v. 236.* Apuleius opposes (*scrupulum*) to a more perplexing anxiety which he commonly calls *lancea*. See Scip. Gent. ad Apuleii Apolog. p. 150.

Sect.

## Sect. XLII.

What free  
and less  
free con-  
science  
mean?

Besides, it may happen that the mind, precipitated into vice by impetuous appetites, and as it were enslaved by evil habits, is not able to reason freely about actions; but is strongly biased towards the side of its passions; in which servile state conscience is not a free and impartial reasoner. But the mind which hath delivered itself from such miserable bondage into a state of liberty is free. This distinction is accurately explained by *Wolffius's Ethic.* § 84.

\* Hence that paradox of the Stoics: "Every wise man only is free: and every fool is a slave." Cicero. Parad. 5. He whose virtue hath rescued him from slavery to vice, into a state of freedom, despises and tramples upon every disorderly passion, and says with great magnanimity: "I will not receive arbitrary commands: I will not put my neck under a yoke: I must know what is greatest and noblest; what requires most strength of mind: the vigour of the soul must not be relaxed: If I yield to pleasure, I must succumb to pain, to toil, to poverty. Nay, ambition and anger will claim the same power over me," Seneca. Ep. 51. Upon which place Lipsius ad Philof. Stoic. l. 3. Differ. 12. discourses to this purpose: "Mark, says he, how many masters he had already rid himself of? Add to these, lust, avarice, and other vicious passions, and you will have a multitude of what may properly be called tyrants. How wretched is the slave who is in subjection to them! How free and great is he who hath put them under his feet? What liberty can we say remains to a conscience which so many vitious disorderly appetites and passions have fettered and enshackled?"

## Sect. XLIII.

What  
sleeping,  
lulled  
awakened  
and feared  
conscience  
mean?

We know by experience that men are sometimes lulled so fast asleep by their vices, that they have no feeling of their misery, and never think upon duty, or right and wrong. Now, as we then say, conscience is in a deep *lethargy*; or if it is, by a long habit of vice, become quite obdurate and callous,

callous, we say it is *seared* as with a burning iron \*. So conscience seems as it were to *awake*, when a person roused by calamity, or a sense of danger, begins to examine and ponder his actions with some attention, and to reflect and reason about their goodness or depravity.

\* *Cauterio usta*, an emphatical way of speaking by St. Paul, 1 Tim. iv. 2. For as the finger, or any member of the body burnt with a hot iron loses all sensibility; so the mind inured to a vitious course, does not feel its misery which others behold with horror: the same apostle, Ephes. iv. 19. calls such persons *past feeling*. See Beza's commentary on the place.

#### Sect. XLIV.

We have already remarked that every one's conscience condemns or absolves him (§ 35): but because absolution must be accompanied with the highest satisfaction of mind, and condemnation with the bitterest uneasiness and disquiet; hence it follows, that a good conscience, acting upon certain evidence, is for the most part quiet and easy; an evil conscience is disturbed by racking remorse; (which torment the antients compared to the burning torches of the furies): and a dubious one is very anxious and restless, to such a degree, that it knows not to what hand to turn itself. These affections however belong more properly to the effects of conscience than to conscience itself, as every one will immediately perceive.

\* So Cicero pro Sex. Rosc. Amer. cap. 24. Now these remorse of conscience are an irrefragable argument against those who absurdly maintain, that the uneasiness of conscience arises wholly from the fear of civil punishment, to which criminals are obnoxious. For in the first place, 'tis not private persons only who are harassed day and night by these terrible furies; but even those whom birth and grandeur have set above all liability to punishment in this world, such as a Nero, according to Sueton. cap. 34. And secondly, if any should rather imagine he feared the

uff



just resentment of the people, there are not wanting examples of persons who in their dying moments, when they could have nothing to fear from men, have been inexpressibly tortured by a secret consciousness of crimes unknown to the world: as Chilo Lacedemonius, who in Aulus Gell. Noct. Att. l. 3. thus speaks, "I surely, said he, at this moment do not deceive myself, when I think I have committed no crime the remembrance of which can create me any uneasiness, one only excepted, &c. And Sueton relates a saying of the emperor Titus to the same purport. Tit. cap. 10.

## Sect. XLV.

Whether  
conscience  
be the rule  
of human  
actions?

Whence we see what judgment we are to form of the opinion of those who assert that conscience is to be held for the internal rule of human actions. For if a rule cannot answer the end of a rule unless it be right, certain, and invariable (§5); who will admit conscience to be a rule which is sometimes erroneous (§39); sometimes only probable (§40); sometimes doubtful and wavering; (§41) and frequently overpowered by perverse appetites (§42); wherefore, tho' he be guilty who acts contrary to conscience, whether certain or probable; yet he cannot for that reason be said to act rightly and justly, who contends that he has acted according to his conscience\*.

\* Conscience is not the rule, but it applies the rule to facts and cases which occur; wherefore, it is safer to omit an action concerning the pravity of which we reckon ourselves fully convinced, than it is to do an action which conscience esteems just and good, without being certain of the law. He then who follows an erroneous conscience sins on this very account, that he follows it rather than the will of the legislator: tho' he be more excusable than one who acts directly against conscience, yet he is guilty. For which reason, I cannot go along with the opinion of Limborch, who in his Christian Theol. l. 5. c. 2. § 8. maintains, that even an erroneous conscience must be obeyed.

Sect.

## Sect. XLVI.

Hence we may conclude, that while conscience <sup>Why acti-</sup> is uncertain, and fluctuates between contrary opini- <sup>on ought</sup> ons, action ought to be suspended. This we assert <sup>to be sus-</sup> in opposition to Ger. Gottl. Titus, in his observa- <sup>pended</sup> tions on Puffendorf de off. hom. & civ. l. I. c. I. <sup>while con-</sup> § 6. And for one to do any thing with such an ob- <sup>science</sup> stinate obdurate mind, as to be very little concerned <sup>doubts?</sup> about knowing the divine will, and determined to do the same, even tho' he should find it to be prohibited by God, is the height of perverseness.

\* To this purpose it is well said by Cicero de Off. l. 9. "For this reason it is a good precept which forbids us to do any thing, of the goodness or iniquity of which we are in doubt. For honesty quickly would shew itself by its own native brightness: and the doubting about it is a plain intimation that at least we suspect some injustice in it." *i. e.* He who ventures to do what he doubts whether it be honest or dishonest, by so doing bewrays a propension to do an injury. Hence the apostle says, *Rom. xiv. 23.* "And he that doubteth is damned if he eat, because he eateth not of faith, and whatsoever is not of faith is sin."

## Sect. XLVII.

From what hath been laid down, it is plain that <sup>The</sup> ignorance and error are the great hinderances to <sup>weaknes-</sup> conscience in the application of a law to a fact. <sup>ses or de-</sup> By the former is understood the mere want of <sup>fects of the</sup> knowledge; by the other is meant the disagree- <sup>under-</sup> ment of an idea, a judgment, or a reasoning to <sup>standing,</sup> truth, or the nature of the thing. One therefore <sup>ignorance</sup> is said to be ignorant who hath no idea before his <sup>and error,</sup> mind; and one is said to err, who hath either a false idea of the object, that is, an idea not conformable to it; an obscure, confused, or inadequate idea. For an error in the idea must of necessity infuse itself into the judgment made concerning an object, and from thence into all the reasonings about it.

Sect.

## Sect. XLVIII.

Whether  
ignorance  
and error  
of all sorts  
be cul-  
pable ?

But because all men are not under an obligation to find out the more abstruse truths which may be said to lie at the bottom of a deep well ; and in reality the ignorance of some things is rather attended with advantage than detriment \* ; (yea, as Terence observes, Hecyr. the ignorant and illiterate often do more good in one day, than ever the learned and knowing do ;) hence it may be inferred, that ignorance and error of every kind is not evil and blameable.

\* An example of this might be brought from the ignorance of certain crimes, which ought not so much as to be named ; for there the maxim holds, *ignotorum nulla cupido* ; what is unknown is undesired. Who would not wish many were in a state of ignorance, which would effectually shut out and render the mind quite inaccessible to certain vile concupiscences ? Justin. Hist. 2. 2. says, “ the Scythians were better through their ignorance of several vices than the Greeks were by their knowledge of virtue.” Nor does Quintilian seem to have less admired the ancient Germans, when speaking of a most enormous vice, he says “ they were totally ignorant of it : their manner of living was more pure, &c.”

## Sect. XLIX.

What  
kind of  
ignorance  
and what  
kind of  
error is  
culpable ?

Yet since the will makes no election unless it be excited to it by the understanding ; and therefore the understanding concurs in producing moral actions (§ 30), the consequence from this is, that they are not blameless who are grossly ignorant of those truths relative to good and ill, just and unjust, which it was in their power easily to understand, or who err with regard to these matters, when error might have been avoided by due care and attention to acquire right and true knowledge.

## Sect. L.

Ignorance  
is either  
vincible

Hence arise various divisions or classes of ignorance and error, so far as it is or is not in our power to

to escape ignorance, it is *vincible* or *invincible* \*. or invincible, voluntary or involuntary. So far as one is or is not the cause of it himself, it is *voluntary* or *involuntary*. Finally, if one does any thing he would not have done had his mind not been obscured by ignorance, such ignorance is called *efficacious* or *effectual*. But if he would have done the same action tho' he had not been in the state of ignorance in which he did it, it is called *concomitant*. Repentance is the mark of the former; but the latter discovers itself by the approbation given to the action done in a state of ignorance, when that ignorance no longer takes place. Now all this is equally applicable to error.

\* Ignorance and error are said to be invincible, either in regard of their cause or in themselves; or in both respects at the same time. Thus the ignorance of a drunken person is in itself invincible, so long as his madness continues; but not in respect of its cause, because it was in his power not to have contracted that madness. On the other hand, the hurtful actions of mad men proceed from ignorance, which is invincible, both in itself and in regard of its cause, since they not only do not know what they are doing, but it was not in their power to have escaped their madness. All this is true, and hath its use in the doctrine of *imputation*: But the first cannot so properly be called invincible, since it might and would have been avoided, had not the mind been very regardless of duty. The matter is admirably explained by Aristotle in his books to Nicomachus, 3. 7. where speaking of that law of Pittacus which inflicted a double punishment upon the crimes committed by drunken persons, he immediately adds: "A double punishment is appointed for the crimes of drunken persons; because these actions are in their source from them. It was in their power not to get drunk. But drunkenness was the cause of their ignorance." Concerning this law of Pittacus see Diogenes Laertius, 1. 76. and Plutarch in Conviv. sept. sap. p. 155.

## Sect. LI.

We proceed now to consider the other principle of What human or moral free actions, *viz.* the *will*, (§ 30) which will is?

D

is



is that faculty of our mind by which we choose and refuse. Hence it is justly said, that truth and falsehood are the objects of the understanding; but that the will is conversant about good and ill. For the will only desires truth as it is good, and is averse to falsehood only as it is ill\*.

\* Thus no wise man desires to know his future calamities, because it would only serve to anticipate his suffering. And therefore, however true his foreknowledge might be, it would not be good. Children, on the other hand, are very fond of fables, even tho' they know they are feigned, because they perceive them to be fit lessons for their instruction; or at least very entertaining: and on these accounts, they look upon them as good.

### SECT. LII.

Its nature  
and acts.

From this definition we may conclude that the will cannot choose any thing but what is exhibited to it by the understanding under the shew of good, nor turn aside from any thing but what appears to it to be ill. The greater good or ill there seems to be in any thing, the stronger in proportion is our inclination or aversion; and therefore the desire of a lesser good or a lesser evil may be overpowered by the representation of a greater good or evil. Aversion does not consist in a mere absence of desire, but hath something positive in it, which is called by Koehler, *exerc. jur. nat. § 167. voluntas vel reclinatio, refusing or aversion.*

\* As the Civilians accurately distinguish between *non nolle* & *velle*, l. 3. D. de reg. Juris; so we ought to distinguish between *not willing*, and *not desiring* and *refusing*, or *having an aversion*. There are many things which a wise man does not choose or will, tho' he does not abhor them. Thus he does not desire immortality on earth, because nature hath not granted it; nor empire, because fortune hath not allotted it to his birth: But he has no aversion to these things, but on the contrary pronounces them great and noble goods. He does not desire what his rank puts beyond his power to attain, but he would not dislike

dislike it if he could obtain it. Thus *Abdolominus*, intent upon his daily employment, dressing and weeding his little garden, had no thoughts of royalty: he did not desire it, yet he did not refuse and despise it, when he was saluted king, and presented with the royal robes and ensigns. *Cur. de gest. Alex. 4. 1.*

Sect. LIII.

From the same definition it is clear that man, <sup>Its spon-</sup> with regard to his will, acts not only *spontaneously* <sup>tanity and</sup> but *freely*. For *spontaneity* being the faculty <sup>liberty.</sup> of directing one's aim to a certain end, but liberty being the power of choosing either of two possibles one pleases; it is plain from experience, that both these faculties belong to our minds. The servile subjection one is under to his perverse appetites and affections till virtue makes him free, is not inconsistent with these properties. For these obstacles are of such a kind, as hath been observed, that they may be removed and overpowered by the representation of a greater good or evil to the understanding (§ 52)\*.

\* Thus, whatever propension a thief may have to steal, yet he would not yield to that wicked cupiditv, could he set before his eyes the dismal effects of his crimes, the horrors of a dungeon and shackles, and the ignominy of a gibbet. And those who are most highly charmed with indolence and voluptuousness, would quickly be inflamed with the love of a nobler life and more honourable pursuits, if, calling in reason to advise them, they could fully perceive the excellence of wisdom, its agreeableness and manifold advantages on the one hand, and on the other side the irreparable ignominy and detriment which are inseparable from sloth and ignorance. Epictetus dispatches the whole matter with great brevity. *Arrian. l. 17.* "Can any thing overcome an appetite? Another appetite can. Can any thing get the ascendant of an inclination or propensity? Yes really another can." And he illustrates it by the same example of a thief we have just now made use of.

## Sect. LIV.

Do tem-  
perament  
or bodily  
constitu-  
tion affect  
it?

Hence it is evident, that bodily constitution, (which philosophers call *temperament*) does not infringe upon the liberty of human will. For tho' the mind be variously affected by the body, so as to be rendered by it more propense to certain vices; yet that propensity hath no more of compulsion or force in it than there is in the inducement to walk out when fine weather invites one to it. But who can deny that the will is left intire, and not hindered or prevented from choosing either to walk out or not as it shall appear most reasonable, when inticed by all the charms of spring?

## Sect. LV.

Whether  
affections  
and habits  
encroach  
upon it?

The same is true concerning all the affections and motions excited in the mind by the appearances of good and ill. For tho' the mind, with respect to the first impression, be passive, every thing else is however intirely in its power; to resist the first impulse, not to approve it, nor to suffer it to gain too much force. And it likewise holds with regard to habits, *i. e.* propensions confirmed by long use and practice. For tho' these gradually become so natural, that tho' expelled with never so much force, they recoil, Hor. ep. 1. 10. v. 24. (*si expellas furca, tamen usque recurret*) yet they are not incorrigible, but may be amended, if one will but exert his liberty.

\* Habits are affections and propensities become strong by daily repetition or custom. Now what has been contracted by practice may by disuse be abolished and erased, if we will but give as great pains to destroy it as we did to establish it into strength. There is an elegant passage to this effect in Aristophanes in *Vespis.* thus translated into Latin.

*Ufus quo fueris diu,  
Mutare ingenium, grave est.*

*Multos*

*Multos invenias tamen,  
Qui mores moniti suos  
Mutarunt melioribus.*

Sect. LVI.

*External violence* is so far from taking away the liberty of the human mind, that it affords a strong proof of our liberty. For tho' one may be hindered by force from doing what he chooses to do; yet no force can make one will what he does not will, or not choose what he chooses \*. If the understanding represents the good attending an action as greater than the imminent evil, no external violence can force one to quit his resolution, he will remain unshaken by all the menaces of power or cruelty.

*Nec civium ardor prava jubentium  
Nec vultus instantis tyranni  
Mente quatiet solida.*

\* This is likewise observed by Epictetus in Arrian, l. 1. 17. After he had asserted, that an appetite can only be overcome by another appetite, he adds: "But it may be said, he who threatens me with death forces me. Truly the cause is not that which is threatened, but it is owing to your thinking it better to do the action than to run the risk of dying: it is therefore your opinion which forces you, i. e. one appetite overcomes another."

Sect. LVII.

Hence we see that the distinction between *antecedent* and *consequent will* ought not to be rejected; the former of which decides without a view of all the circumstances which may happen at the time of acting; the other suits itself to the circumstances which appear at that instant. The one therefore is not opposite to the other, tho' they be very different. Thus it is true that God loves peace, and yet that in certain circumstances he does not disapprove war.



## Sect. LVIII.

Actions  
are spon-  
taneous,  
forced,  
volunta-  
ry, and  
mixed.

Further, it is equally plain that those actions are *spontaneous* which are performed by a mind determining itself to a certain known proposed end; these are not spontaneous which do not proceed from such a determination of the mind, but are done without intention. Again, even spontaneous actions are *voluntary*, to perform which no external necessity compels; and such are *forced*, to which one is necessitated by some external urgent circumstances. We need not add *mixed*, because actions called such, being performed under some external necessity urging to it, coincide with those which are called forced actions \*.

\* Those are called by some mixed actions, which one does under an urgent necessity, so as that he would rather not do them. Such as that case described by Lucretius de rer. nat. l. 2. v. 277.

*Jamne vides igitur, quamquam vis extima multos  
Pellit, & invitos cogit procedere sæpe,  
Præcipitesque rapit, tamen esse in pectore nostro  
Quiddam, quod contra pugnare obstareque possit ?*

The same happens in every forced action. For no external violence can force us to will or not to will (§ 56.) and therefore there is no use for the distinction between compelled or forced and mixed actions,

## Sect. LIX.

Actions  
not spon-  
taneous  
are invo-  
luntary  
Forced ac-  
tions are  
voluntary.

Hence it is obvious that no action which is not spontaneous is voluntary (§ 58); but forced actions may be voluntary. For tho' we would rather not act were not a very great evil set before us, yet it is the will which determines to act; whence it follows, that the antient lawyers were in the right when they affirmed, that one who is forced, wills. D. l. 21, § 5. *quod met. causa*. "coactum etiam velle."

REMARKS

## REMARKS on this Chapter.

Our Author doth not enter at all into the dispute about necessity and free agency. It would have been a digression from his subject. The question is most accurately handled by Mr. Locke in the chapter of Power, in his Essay on human understanding. See likewise what I have said of it in my Introduction to the principles of moral philosophy; and in the Christian philosophy, sect. 2. prop. 4. But I think the whole matter may be dispatched in a few words. It is as much a matter of experience as any other whatever, That several things depend upon our will as to their existence or non-existence; as to sit, or stand, or walk; to write or not write: to think or leave off thinking on this or the other subject, &c. But so far as it depends in this manner on our will, or pleasure to do, or not to do, we are free, we have power, dominion, agency; or we are not passive but active beings. To say we are not free, but necessary, must be to assert either that we are not conscious, which is contrary to experience; or that we never will, which is also contrary to experience; or that our will never is effective, which is equally so, since many things depend on our will: For necessity must mean one or other of these three, or all of them together. There is no other property included in the idea of a free agent; there is no other conceivable property belonging to action or agency, besides willing with power to effect what is willed. To say that the will is not free, because it must desire good and hate ill as such, is to say freedom or activity cannot belong to a mind endued with the power of willing; since willing means complacency in good, or preferring it, and aversion to evil, or desire to avoid it, *i. e.* it is to say freedom means some property that can't exist, because it implies a contradiction, *viz.* willing without willing. Freedom is the very idea of agency: it is that which constitutes an agent; and it signifies having a certain degree or extent of power, efficiency, or dominion by our will. And that we have a certain degree or extent of power, efficiency, or dominion by our will, is as manifest to experience as that we think: nor can a proof of it be demanded, unless at the same time a proof of thinking and consciousness be demanded.

As for what our Author says about erroneous conscience, it will be better understood by what is said in the fourth chapter about imputation, and our remark added to that chapter. Mean time we may observe, 1. That if to acquire knowledge for the direction of our actions be not among our  $\tauὰ ἐφ' ἡμῖν$ , or within our power, the direction of our actions cannot be in our power, that is, we are not agents. If we are not accountable for our not having knowledge sufficient to direct our actions rightly, we cannot be accountable for our actions. 2. Our views, our judgments of things must be our rule; we can have no other: yet ultimately, the nature of things is the rule, because the natures of things are stubborn, and will not yield to our misapprehensions

of them. It is the same here as with regard to mechanicks, where no difficulty is started. The nature of mechanical powers and properties will not submit to our notions; yet we must work in mechanical arts according to our apprehensions of mechanical laws and properties. Our ideas and judgments are our immediate guide; but the natural qualities and relations of things are the ultimate standard. The former may vary, but the latter are unchangeable. The ultimate measure of opinions, which is truth or nature, is constant, immutable.

### CHAP. III.

*Of the rule of human actions, and the true principle of the law of nature.*

#### Sect. LX.

Of what nature or kind the rule of human action must be.

**S**UCH, we have already seen, is the nature of our free actions, that they must have a rule to direct them (§ 4); there we likewise shewed that a rule could not serve the purposes of a rule, if it be not straight or right, certain, evident, and invariable, and have external as well as internal obligation. Let us now enquire a little more accurately what this rule is which hath all these properties essential to a rule for human, free, moral actions.

\* Let us not confound the rule of human actions with the principle of natural law. The former is what philosophers call the (*principium essendi*) because it constitutes the principle or source of obligation to us. By the latter we understand *principium cognoscendi*, *i. e.* the principle, the truth or proposition from which our obligation to any action appears or may be deduced. These are different, even with regard to civil states. For the source or principle of the obligation under which all the members of any state whatsoever lie, is the will of the supreme authority in that state, and that is also the rule to which every member of a state is obliged to conform himself. But if it is asked whence or how that supreme will may be known, in every state you will be referred to its laws; and therefore, these are likewise in every state the sole and adequate principle or source of knowledge with respect to civil duties and obligations,

Sect.

## Sect. LXI.

The rule of human actions must either be within us or without us. If it be within us, it can be none other but either our own will, or our understanding and conscience. But neither of these faculties is always right, neither of them is always certain, neither of them is always the same and invariable; wherefore neither any of them, nor both of them together, can be the rule of human actions; whence it follows that the rule of human actions is not to be found in ourselves; but if there be any such, it must be without us.

The rule of human actions is not to be found in us, but without us.

## Sect. LXII.

Now without us exist other created beings, and likewise a *God*, the author of all things which exist. But since we are enquiring after a rule of human actions, carrying with it an external obligation (§ 9) and made known or promulgated to all mankind by right reason (§ 11); and since external obligation consists in the will of some being, whose authority we acknowledge (§ 9), there being no other whose authority we are obliged more strictly to acknowledge than the infinitely perfect and blessed *God* (§ 10); and seeing he alone can promulgate any thing to us by right reason, of which he is the author, it follows, by necessary consequence, that the *will of God* must be the rule of human actions, and the principle or source of all natural obligation, and of all virtue.

It is to be found in the will of God.

\* We therefore fall in with the opinion of the celebrated Sam. a Cocceis, who in his dissertations already cited (§ 10) has demonstrated this truth by solid arguments, and likewise defended it against objections and censures with great judgment and erudition, Dissert. 1. qu. 2. § 6. & seq. where he has gathered together very many passages from ancient authors to prove this to have been the more general opinion of ancient moralists, the chief of whom are Xenophon, Sophocles and Cicero.

Sect.



## Sect. LXIII.

\* The will of God is an infinitely perfect Being cannot will what is not a right, perfectly good and right: it must be a *certain*, rule, since reason discovers it to all men; and it and constant rule. must be *unvariable*, because the will of God can no more change, or be changed, than God himself, or right reason, by which it is discoverable. Finally, it must be *obligatory*, since God hath the justest claim and title to our obedience; and men have no reason or right to decline his authority, and cannot indeed if they would. Hence at the same time it is evident, that every will of God is not the rule of human actions, but his obligatory will only \*.

\* The will of God is of a large extent, and its various divisions are fully explained in treatises of natural theology; by none more accurately than by Ruardus Andala, Theolog. nat. part. 2. c. 8. § 6. & seq. and Wolfius Theolog. nat. part. 1. c. 3. It is sufficient for us to observe, that God himself being the primary object of his will, as he loves, approves, and delights in his own perfections, and the whole universe, to which he gives being by his will, is upheld, governed and moved according to certain laws chosen and approved of by him, and is therefore the object of his will; wherefore here we understand by the divine will, the will of God relative to the actions of his intelligent creatures, either with respect to doing, or not doing: and this will we call *moral* or *obligatory*.

## Sect. LXIV.

This rule may be called a law with regard to mankind. Since therefore the *obligatory will of God*, which we have shewn to be the only rule of human actions, is his will with respect to the actions of his rational creatures, as to acting or forbearing to act (§63); it is evident, that this rule, considered with relation to man, may properly be called a *divine law*, because it is the will of the supreme Being, commanding or forbidding certain actions with rewards and penalties (§9). But because there are other laws of God

God to mankind which are made known by revelation, and are therefore called *positive*, those which are known to man by natural reason, are justly denominated *natural*; and according as they either command, prohibit, or permit, they are with good reason divided into *affirmative*, *negative*, or *permissive*.

Sect. LXV.

Now since this divine will, or divine natural law, is the source and principle of all justice (§ 63), it follows that every action, not only human, but divine, which is conformable to this divine will, is *just*; and therefore it is objected, without any reason, against this doctrine, that there could not be any such thing as divine justice, were there no other principle or source of the law besides the *divine will* \*. The explication of the divine justice may be deduced from the divine will.

\* The author of the Observat. Hanover. ob. 8. objects against this doctrine of Sam. de Cocceis in this manner: "Other dangerous consequences would likewise follow from this position, such as have indeed been thrown out by some most rashly and unwarily; as for instance, that there is no such thing as divine justice. For if justice only means the command of the Creator, or of one who hath power to enforce his will; it is manifest that justice cannot belong or be ascribed to God, since he cannot be forced or compelled; and therefore he may without any injustice damn an innocent person, and make the greatest scelerate immortally happy. Upon which hypothesis, the fear of God will indeed remain, but the love of him cannot take place." But since God wills nothing but what is right and just, why may not the divine justice be explained from the consideration of his will? There is indeed, with respect to God, no command, no co-action, and therefore no external obligation: but the same holds true with regard to supreme authority in states, in relation to the laws constituted by it. For tho' a prince who has supreme absolute power be not strictly speaking bound by his own laws; yet we call him just, when he renders to every one conformably to his own laws. Why then may we not call God just, because he renders to every man what is due

due to him, according to his own will and law? Man therefore is denominated just, when he gives obedience to the will of God promulgated as a law. But God is just, because he renders to every one his due without law, without co-action or external obligation. God cannot damn an innocent person, or make an abandoned scelerate happy. Because by so doing, he would act not according to his own will, by which he wills nothing but what is just, equitable, and suitable to his own perfection.

## Sect. LXVI.

The difference between the rule of divine and human justice, in what does it consist? Herein chiefly lies the difference between *divine* and *human* justice, that with regard to the former there is no law or co-action; whereas the latter includes in it a respect to a law, and external obligation or co-action (§ 65 & § 64). Wherefore the divine will, as it is a rule of action to men, carries with it a communication of some evil or punishment to transgressors; tho' that punishment be not, as in human laws, defined and ascertained, but be, for the greater part, indefinite, and reserved to God himself, to be inflicted according to his wisdom and justice \*.

\* Those who call every suffering or evil which attends a bad action, or is connected with it, *punishment*, rightly divide *punishment* into *natural* and *positive*. So the learned Kochler. exercitat. jur. nat. § 362, & seq. But if by *punishment* be understood the suffering or evil which the law itself threatens against offenders, it is *positive punishment* only which properly falls under the name of *legal* or *authorative punishment*. *Natural punishment* is acknowledged even by atheists. *Positive punishment* those only can acknowledge who believe the divine Being, and providence: Now, tho' particular *positive punishments* be not defined; yet right reason sufficiently proves, that God cannot but render to mankind according to their actions, whether they be good or bad, suitable rewards and punishments. For that plainly and directly follows from the idea of the divine justice, and is admitted by all who do not call divine providence into doubt. Xenophon Memorab. Socrat. l. 4, 16. "Do you think the Gods would have impressed human minds with an opinion that they

they can inflict punishments and bestow rewards upon them, if they really could not do it; and if men being for ever deceived never felt any such thing?"

## Sect. LXVII.

But since it cannot be doubted that there is no other rule of human actions but the will or law of God (§ 63), it is to be enquired how we may come to the certain knowledge of this law. But since it is universally acknowledged to be promulgated to all men by right reason (§ 11), and since right reason is our faculty of reasoning, by which we deduce truths from other truths by a chain of consequences (§ 15), it is obvious that there must be some truth or proposition, from which what is agreeable to the will of God, and therefore just, may be ascertained by necessary consequence. There must then be some universal principle of science with regard to the law of nature\*.

\* How that differs from the rule itself, hath been already explained (§ 60). Tho' the celebrated Sam. de Cocceiis hath taken the term *principle* in a larger acceptance, yet what is objected to him by Jac. Frid. Ludovici is a mere logomachy. For how the will of God may be discovered by us, he shews Differ. 1. qu. 3. and he has there clearly distinguished between the *will of God*, as a rule and principle *essendi*, i. e. of moral obligation, and the means of science, or the proofs by which the will of God may be ascertained to us, which are the principles of science with respect to the law of nature.

## Sect. LXVIII.

Every principle of science must be *true*, *evident*, and *adequate*; wherefore the principle of science, with respect to natural law, must be *true*; lest being false or fictitious, the conclusions inferred from it be such likewise: it must be *evident*, and that not only in this sense, that it is intelligible to the literate; but universally, to the unlearned as well as the learned, all being equally under obligation to conform



conform themselves to the law of nature. In fine, it must be *adequate*, or of such an extent, as to include in it all the duties of men and citizens, not Christians only, but those also who have not the benefit of divine revelation \*.

\* In like manner therefore, as the more subtile demonstrations of the divine existence are suspected, because that truth must be capable of an evidence that may be understood by the most ordinary understanding (and therefore the apostle says, "God may be found out by searching, and is not far from any of us," *Acts* xvii. 27.) So a too subtile principle of natural law is suspicious, since all are, *ἀναπολόγητοι*, without excuse, even the illiterate, and those who are strangers to subtile refined philosophy, if they offend against the law of nature.

#### Sect. LXIX.

Whence this principle is not to be found in the sanctity of God. Therefore we must not expect to find this principle of the law of nature in the conformity of our actions to the sanctity of God: for tho' the proposition should be granted to be true, yet it is not evident enough, nor of such a nature, as that all the duties of men and citizens can be inferred and proved from it \*.

\* How obscure the idea of the divine sanctity is, whether in a theological or juridical sense, hath been already proved by Sam. Puffendorf. *Specim. controvers.* 4. 4. and Thomas. *fundam. juris. nat. & gent.* And because there are many human duties, of which there is no archetype in God, as for instance, gratitude towards our benefactors, reverence toward our superiors, paying debt, and such like: For these reasons it is not the principle of moral knowledge.

#### Sect. LXX.

Nor in the justice and injustice of actions considered in themselves. Nor is this a sufficient principle, "that what is in its own nature just is to be done, and what is in its own nature unjust is not to be done." For tho' we have already admitted, that certain actions are in

in their own nature good, and others evil, and that man is therefore obliged to perform the one, and to avoid the other, by an intrinsic obligation (§ 8); yet an action antecedently to, or independently of a law, is not just (§ 7); not to add that this principle is not evident enough, nor that all human offices are not deducible from it \*.

\* To just actions we are impelled by an external obligation (§ 7). External obligation consists in the will of an acknowledged superior, commanding under penalty (§ 9): such a will is a law (§ 9). Wherefore, no action can be just or unjust but in reference to a law: and hence every sin is called *ἀνομία*, *i. e.* a transgression of a law. 1 Ep. John iii. 4.

SECT. LXXI.

None, I think, will rashly go into the opinion of Nor in the those learned men, who held the consent of all na-  
tions, or of all the more civilized nations, to be the <sup>consent of all na-</sup> principle of natural law. For it is not *true*, that <sup>tions.</sup> what all nations agree in, is also conformable to the divine will \*; nor is this universal consent *evident* to all, since it must be collected from various testimonies of authors, antient and modern; nor is it sufficiently *adequate* to point out all duties \*.

\* Thus Cicero thought the voluntary law of nations, as it is called, must be established, Tusc. quest. disp. I. 13. "The agreement of all nations in a thing is to be held a law of nature." Grotius lays great stress on this principle *de jure belli & pacis*, proleg. § 11. where speaking of the way of establishing the laws of nature and nations, he says, "I have made use of the testimonies of Philosophers, Historians, Poets, and in the last place Orators; not that we are rashly and implicitly to give credit to whatever they say (for it is usual with them to accommodate themselves to the prejudices of their sect, the nature of their subject, and the interest of their cause): But that when many men of different times and places unanimously affirm the same thing for truth, this ought to be ascribed to an universal cause; which, in the questions treated of by us, can be no other

other than either a just conclusion drawn from the principles of nature, or an universal consent. The former points out the law of nature, the other the law of nations." But we find a wonderful consent almost of all nations in many things which none will assert to be of the law of nature or nations; as in polytheism, idolatry, sacrifices, robbery committed in a foreign territory. Besides this agreement of nations is not easily shewn, as Grotius himself confesses, l. i. c. 15. "But the more extensive is the law of nations, which derives its authority from the will of all, or at least, of many nations. I say, of many, because there is scarce any right found, except that of nature, which is also called the right of nations, common to all nations. Nay, that which is reputed the right or law of nations in one part of the world, is not so in another, as we shall shew hereafter, where we come to treat of *prisoners of war* and *postliminy*, or the *right of returning*." How many duties therefore cannot be deduced from the consent of nations?

## Sect. LXXII.

Nor in the  
seven pre-  
cepts of  
*Noah*.

But as those who endeavour to establish the law of nature and nations from the consent of nations, not only lay down a false, unevident, and inadequate principle; but likewise go out of the question into one of another kind, while they derive the law of nature not from nature itself, but from the traditions or opinions of nations: so the opinion of those who have attempted to deduce the law of nature and nations from the precepts given to Noah, labours under the same defects, as hath been sufficiently proved (§ 16).

## Sect. LXXIII.

Nor in  
the right  
of all to  
all things,  
or in the  
study of  
external  
peace.

What shall we then say of the whole philosophy of Hobbes in his books *de Cive*, or his *Leviathan*? when he asserts the right of every man in a state of nature to all things, he affirms a proposition which is neither *true*, nor *evident*, nor *adequate*, since the duties of men to God and themselves cannot be deduced from that principle; yea, while he goes about in  
that

that manner, pretending to establish the law of nature, he really subverts it, as Hen. Cocei. def. de jure omnium in omnia, has shewn. Hence it is plain what we are to think of this other principle, viz. "that external peace is to be fought and studied if it can be obtained, and if not, force and war must be called to our aid." For here likewise Hobbes lurks behind a curtain \*.

\* First of all, this principle is far from being evident. For what means this limitation, *if it can be had*? How liable is it, however it may be explained, to be abused by litigious persons, who will complain that they cannot enjoy peace, if others will not suffer them? like the wolf in the fable, who pled that the lamb had troubled his water. Phæd. Fab. I. I. Some poet has justly said,

*Sic nocet innocuo nocuus, caussamque nocendi  
Invenit. Heu regnant qualibet arte lupi.*

This defect in this principle hath been already observed by Thomaf. in Fundam. Jur. nat. & gent. I. 6. 18.

Sect. LXXIV.

That principle laid down by Val. Alberti professor of divinity and philosophy at Leipsic, hath a specious shew of truth and piety, viz. a state of integrity. But Puffend. Specim. contr. 4. 12. and Thomaf. jurispr. divin. 4. 40 & seq. have proved it to be false. And granting it to be true, that whatever is agreeable to a state of *primitive integrity*, is truly of the law of nature; yet how unevident this principle must be, not only to Pagans, but even to Christians, is manifest. Further, since the laws of citizenship, of war, of contracts, and many others, for which there was not place in that most happy state, cannot be deduced from the idea of it, who can call this principle *adequate* \*?

Nor in the state of integrity.

\* How few things are told us in the sacred records that can give us an image of that state of integrity? About what is revealed to us in scripture concerning that state, Christians are divided into various sects and very differing

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opinions.



opinions. What then shall we say of the Heathens, ancient and modern? They have a fable among them about a golden age, which some imagine to have taken its rise from a tradition concerning the paradise-state. They have other fictions with which they are highly delighted, which have some resemblance to the Christian doctrine concerning God, of which Pet. Dan. Huet. Quæst. Alnet. p. 172. hath treated in the learned manner so peculiar to him. But so dissonant and widely differing are all these things, that no Christian will ever be able to persuade a Pagan, nor no Pagan a Christian, that this or the other thing is of the law of nature, which the one derives from his traditions and the other from his revelation, with relation to a state of integrity. We must therefore find out some principle common to Jews, Christians and Pagans, which can be no other but that right reason which is common to all mankind.

## Sect. LXXV.

Nor in sociability.

Grotius, Puffendorf, and several antients, were wonderfully pleased with the principle of *sociability*; nor can it be denied, as we have afterwards expressly proved, that men are so framed that they must live *socially*: but that this is not the *true, evident, and adequate* principle of the law of nature, hath been already demonstrated by the learned and worthy Sam. de Coccius de principio juris nat. diff. 1. qu. 2. § 9. I shall only add this one thing, that many of our duties to God, and to ourselves, would take place, even tho' man lived solitary, and without *society* in the world \*.

\* Cicero de legibus 1. 5. de off. 1. 16. & seq. Seneca de Benef. 4. 18. Iamblichus in Protrept. cap. 20, and several others, have considered the preservation of society as the true fountain of justice, and the foundation of natural law: many authors of this sentiment are accumulated by Puffendorf de jure nat. & gent. 2. 3. 15. and Jo. Hen. Boecler. in Grotii proleg. p. 48. But however many, formerly or at present, may have concurred in this opinion, we cannot however choose but observe there is a great difference amongst them in their account of the reason by which men are obliged to sociability: Some assert, we

we are infligated to it by nature ; some that we are bound to it by the will of God : others again maintain, that necessity alone compels men to a social life.

Sect. LXXVI.

Other principles of natural law are highly boasted of by others ; such as the order of nature, which the Creator intends in his works ; the interest of mankind ; a moral Theocracy, and other such like principles \*. But it is agreed to by all, that these principles are not evident or adequate ; and some of them indeed cannot be admitted without some cautions and restrictions.

\* After Sfort. Palavicinus, Hen. Bodinus in Differ. de jure mundi, maintained the order of nature to be the first principle of natural law. But the latter hath been refuted by Thomafius de fundam. definiendi cauff. matr. hæc. recept. insufficient. § 18. The utility of mankind hath been asserted to be the first principle by the famous Leibnitz and others, who with Thomafius have set up this proposition as fundamental, " That all things are to be done which tend to make human life more happy and more lasting, and that all things are to be avoided which tend to render it unhappy, or to accelerate death, Thom. fund. jur. nat. & gent. 1. 6. 21. A moral theocracy was asserted to be the first principle in a dissertation to that effect, by Jo. Shute an Englishman ; from which ingenious dissertation, several observations are excerpted by the often cited Sam. de Cocceis de princip. juris nat. & gent. diss. 1. qu. 3. § 8.

Sect. LXXVII.

But to give the opinion, which, upon a mature examination of this subject, appears to me the most solid, first of all I would observe, that God being infinitely wise and good, cannot will any thing else with relation to mankind but their happiness. For being perfect, he stands in no need of any thing ; and therefore men, who of all the beings within our cognizance, alone are capable of felicity, were not created by him

The will of God intends our happiness.

for his own advantage, but that he might render them capable of true happiness \*.

\* We do not exclude the primary end, which is the glory of the Creator, and the manifestation of his perfections, which so clearly appear in his works. But this end is universal, and extends to the whole universe. Wolf. von den Absichten der Dinge. cap. 1. § 2. cap. 2. § 1. The particular end for which God created man, must be inferred from the essential parts and properties of which man consists or is composed. Since therefore, he is endued with *understanding*, by which he may come to the knowledge of God and of true good; with *will*, by which he is capable of enjoying God and true good; and he hath a *body*, by means of which he can produce various actions, which tend to acquire and preserve his true happiness; hence it is manifest that God made man that he might be a partaker of true felicity.

Sect. LXXVIII.

To this  
the will of  
God obli-  
ges us.

This being the will of God, that man should aim at and pursue true happiness, and his will being the rule of human free actions, and therefore the source of the law of nature and justice (§ 62); by consequence whereas, human legislators being themselves indigent in several respects, have their own advantage no less in view than that of their subjects in making laws, God, on the contrary, must have made laws to men solely for their own benefit, and have intended nothing by them but their attainment to true happiness, by conforming themselves to them \*.

\* Therefore utility cannot be said, with Carneades and others, to be the sole source of justice and equity (§ 76). For the law of nature would thus not be obligatory, but might be renounced by any one at his pleasure, or by all mankind, as Sam. de Cocceiis has proved, Diff. 1. qu. 2. § 9. But whatever we do for the sake of our true happiness, according to the law of nature, we do it agreeably to the divine will and command, and therefore, according to obligation not merely internal, but likewise extrin-

sical;

fical : and for that reason, so far is any one from having a right to renounce his happiness, that on the contrary, any one would no less deserve punishment by violating a natural law constituted for his good, than any one who in a common-wealth should offend against a law established for the public good.

Sect. LXXIX.

If therefore God intend the happiness of man-That hap-  
kind, and the law of nature be directed towards it piness  
as its end (§ 78), and true happiness consist in the consists in  
enjoyment of good, and the absence of evil; the the frui-  
consequence must be, that by the law of nature God tion of  
must intend that we may attain to the enjoyment of good by  
true good, and avoid evil. But since we can only love ; and  
enjoy good by love, hence we infer that God obliges therefore  
us to love, and that love is the principle of love is the  
law, and, as it were, a compend of it \*. principle  
of the law  
of nature.

\* Here we see a wonderful harmony and consent, between the natural and revealed law or will of God. Our Saviour gives us a summary of revealed law in these few words : " Thou shalt love God with all thine heart, and with all thy soul, with all thy mind, and with all thy strength : and thou shalt love thy neighbour as thy self." *Matt.* xxxii. 37. *Luke* x. 27. and he adds, " upon these hang the law and the prophets." Agreeably to this doctrine of our Saviour, the apostles call love sometimes ἀνακεφαλαίωσιν τῷ νόμῳ, the sum of the law ; sometimes πλήρωμα νόμου, the fulfilment of the law ; at other times, σύνδεσμον τῆς τελειότητος, the bond of perfectness ; and sometimes, τὸ τέλος τῆς παραγγελίας, the end of the commandment, *Rom.* xiii. 9. *Coloss.* iii. 14. *1 Tim.* i. 5. But right reason teaches the same truth, and inculcates no other principle of natural law but *love*, as the sole mean by which we can come to the enjoyment of that happiness or true good, which is the intention of God and of his law ; whence Leibnitz also, *Præf. t. 1. cod. juris gentium diplom.* defines justice to be, *the love of a wise man.*

Sect. LXXX.

*Love* in us is the desire of good, joined with de-What is  
light in its perfection and happiness. *Hatred* is love and  
aversion hatred ?



aversion from evil, joined with satisfaction in its unhappiness; wherefore what we *love*, we receive pleasure from its perfection and happiness, and we are disposed to promote that perfection and happiness to the utmost of our power. What, on the contrary, we *hate*, we rather desire its misery than its happiness.

## Sect. LXXXI.

Love does not give uneasiness. Since we receive satisfaction from the excellence and happiness of what we *love* (§ 80) it is obvious that the lover does not will to give uneasiness to what he loves; nay, he rather suffers pain if any other should attempt any such thing. For because he who gives uneasiness to one, or suffers it to be done without feeling any pain, takes pleasure in another's unhappiness; but to take delight in the suffering of any one, is the same as to hate (§ 80); and to love and hate the same object at one and the same time is a contradiction; the consequence is, that it is inconsistent or impossible at the same time to love one, and to hurt him; or to bear his being hurt by another without disturbance and pain.

## Sect. LXXXII.

Hence the first degree of love, which we call the love of justice. One may be hurt two ways, either by doing something which makes him more unhappy than he is by nature, or by depriving him of some happiness he is already possessed of. But seeing to do something which conduces to render one more unhappy than he is, is to *hurt* one; and to dispossess one of something he hath justly acquired, and which contributes to his happiness, is to *deny* one, or to *take from him something that belongs to him*; hence it follows, that he violates the law of love in the highest manner who hurts one, and disturbs his possession, or takes it away, and hinders his enjoyment of it; and, on the other hand, the lowest degree of love is to hurt no person, but to render to every one what

what is due to him, or leave him in the undisturbed possession and enjoyment of what he hath; which degree of love we call the *love of justice* \*.

\* This is observed by Seneca in his Ep. 95. where he says, how small a thing is it *not to hurt* him whom we ought to profit! He who does not hurt any one is only not a scelerate: he has not yet attained to that kind of justice which the law of love requires, even to do good to others to the utmost of our abilities, and therefore he hath no virtue to glory in. Whence Leibnitz, in Præf. cod. dip. distinguishes three gradations in the law of nature. *Strict justice*, which is to do no hurt; *equity or love*, which is to render to every one what is due to him; and *piety*, which disposes to observe all the rules of virtue; but we must differ from him with regard to his second gradation, because he likewise gives to another his due or his own, who renders what is due to him in strict justice, and therefore *rendering to every one his own*, is not to be referred solely to distributive justice.

Sect. LXXXIII.

But because a lover receives pleasure from the happiness of him whom he loves (§ 80), it follows that he renders to him whom he loves cheerfully, even that which is not strictly due to him, or his right, if he perceives it to be conducive to his happiness: and this is a more sublime degree of love, which we call *love of humanity, or beneficence* \*. But because we call the capacity of discerning things which are contributive to our own happiness and that of others, *prudence or wisdom*; it is obvious that this love of humanity or beneficence must have wisdom for its guide and director \*.

\* Humanity and beneficence differ in this, that by the former we render to others whatever we can do, without any detriment to ourselves, for their advantage: the latter makes us not spare our own goods in order to benefit others, but disposes us to do kind offices to them to our own prejudice. Of the former Cicero speaks de off. 1. 16. "All these things seem to be common to all men, which

“ are of the kind described by Ennius in one instance, “ He that directs the wandering traveller, doth, as it were, light another's torch by his own, which gives “ never the less light, for that it gave another.” By this single example he clearly points out us, that we ought to render even to strangers, whatever good offices may be done to them without prejudicing ourselves. Whence these following, and others of the same nature, are called common benefits, “ To suffer any one to take from our fire to “ kindle his: To give good and faithful advice to one who “ is deliberating: And all things, in one word, which are “ beneficial to the receiver, and nowise hurtful to the “ giver.” Of the latter Seneca has wrote a book which is entitled *De beneficiis*, concerning benefits.

## Sect. LXXXIV.

The difference between them in respect of obligation.

Moreover, whereas he who does not observe the love of justice, who hath it not, or does not act conformably to it, is a profligate person; he, on the other hand, who hath not the love of humanity and beneficence, can only be said not to perform the nobler and greater virtues (§ 82). Now none may be forced to do virtuous actions, but all acts of wickedness may be restrained by punishments (§ 9). Whence it is plain, that men may be compelled to acts of justice, but not to acts of humanity and beneficence. But when obligation is joined with coercion, it is *perfect*; when it is not, it is *imperfect* (§ 9). We are therefore *perfectly* obliged to the love of justice, and *but imperfectly* to the love of humanity and beneficence \*.

\* Those who fulfil their imperfect obligations are said by Seneca to be good men according to the letter of the law; but elsewhere he shews it to be a very small attainment to be good in that sense only; and that in order to merit the character of a wise and virtuous man much more is required, even the love of beneficence, to which one knows he is not strictly obliged. “ Many good offices, says he, are not commanded by law, and do not found an action, which however the circumstances and condition of human life, more powerful than all law, render fit or lay a foundation

foundation for. No human law forbids us to discover our friend's secrets; no human law commands us to keep faith with our enemy. What law obliges us to fulfil our promise to any one? Yet I will complain of him, and quarrel with him, who hath not kept the secret entrusted to him, and will look upon him with indignation who does not keep his pledged faith." Seneca de beneficiis, v. 21.

Sect. LXXXV.

Since *love* always tends towards good (§ 80). Love, how But whatever we embrace with affection as good, distinguished in must either be a more perfect being than our selves, respect of equal, or inferior to us, and less excellent. Love of its object. the first kind, we call *love of devotion* or *obedience*; love of the second kind, we call *love of friendship*; and love of the third sort, we call *benevolence*.

Sect. LXXXVI.

*Love of devotion* or *obedience*, is love towards What love a more excellent and perfect being, with whose of devotion excellence and happiness we are so delighted, on is; that we look upon such a being, as to be honoured what love of friendship; and obeyed with the highest complacency and veneration. The *love of friendship* is the love of our what benevolence? equal, or satisfaction and delight in his happiness, equal to what we perceive in our own. The *love of benevolence*, is the love of an inferior and more imperfect being, which disposes us seriously to promote its happiness, as much as the nature of the being permits.

Sect. LXXXVII.

From these definitions it follows, that we cannot The nature of the have love of devotion or obedience towards a being, love of devotion and unless we be persuaded of its superiority and greater perfection; nor can this love take place, unless obedience. such a being be of such a character and temper as to desire to be loved by us. And this love ought always



always to be joined with veneration and obedience suitable to the perfections of such a being \*.

\* For veneration or honour is a just esteem of the perfections belonging to a being; obedience is a disposition to perform with readiness, whatever another as superior hath a title to exact from us, and to with-hold from doing what he forbids. But since there may be various degrees of perfection and superiority, there will also be as many various degrees of veneration and obedience; and the more sublime the perfection of a being is, the greater veneration and obedience are due to that being.

### Sect. LXXXVIII.

The love  
of friend-  
ship its  
nature.

Further it is plain that the love of friendship arises from equality. Now equality is either an equality of *nature*, or an equality of *perfections*. Wherefore, where the former takes place, equal offices of love are reciprocally due; and for that reason, amongst all who are by nature equal, these incomparable rules ought to obtain. "Whatever you would not have done to yourself, do it not to another." And, "Whatever you would have another do to you do unto them." Matt. vii. 12. Luke vi. 31. Tob. iv. 16. The first of which is the foundation of the love of justice; the other, of the love of beneficence and humanity. But because, however equal the being beloved, and the being loving may be by nature, yet the one may be either more perfect, or more imperfect than the other; it may happen that we may be obliged to have at the same time a love of friendship towards a man, as equal to us by nature, and a love of devotion and obedience, or of benevolence towards him as being more perfect or more imperfect \*.

\* Thus, tho' a prince as superior hath a right to our veneration and obedience, that does not hinder but that he is obliged to render to us the good offices founded upon equality of nature: as for instance, not to do us any injury; not to fix ignominy upon what does not deserve it; and in  
one

one word, to do what Pliny commends in Trajan, i. e. "to remember no less that he is a man, than that he is set over other men to rule them."

Sect. LXXXIX.

Finally, since benevolence seeks the enlargement and promotion of the happiness of a more imperfect being, as much as its nature is capable of happiness (§ 86). Hence it follows, that we ought not to hurt such a being, or refuse to it what is its right and due; but that we ought to do good to it, to the utmost of our power, with prudence however; and therefore whatever kindness is not agreeable to reason, or conducted by prudence, is not benevolence and liberality, but profusion, or any thing else you please to call it.

The love of benevolence.

Sect. XC.

Now if we consider accurately the beings with which we are surrounded, we shall find there are three only, to which we are under obligation to render the offices of love: God, the creator of all things; ourselves, who are certainly the nearest to ourselves; and other men, whom we plainly perceive to be by nature equal to us. For as to spirits, such as angels, we know not their nature, nor have we such commerce with them, as to be under the obligation of certain duties towards them. And between men and brutes there is no communion of right, and therefore no duty is properly owing to them; but we owe this to God not perversely to abuse any of his creatures \*. Puffend. de jure nat. & gent. 4. 3. 6.

What are the objects of this love?

\* For such a communion of right must, as we shall shew afterwards, arise from compact. But brutes are not susceptible whether of active or passive obligation arising from compact. We cannot therefore assent to the Pythagoreans, Porphyry, in his books, *περί αποχῆς*, who not only ascribe sense and memory, but a rational mind

mind to brutes. However so far as men perceive any affection in brutes, so far do they render a love of benevolence toward them; so as not to abuse their power of killing them, but to take pleasure in rendering their life more commodious to them, as we see in the instance of domestic dogs. Plutarch elegantly observes in *Caton. major.* "But we see benignity hath a much larger field than justice; we sometimes extend beneficence to brute animals thro' the largeness of bounty; for a merciful man looks upon himself as obliged to take care of horses which work for him, and not only of young animals but of old ones."

## Sect. XCI.

The first  
axiom of  
love to  
God.

Since we cannot conceive otherwise of God than as a most excellent, most perfect, and infinitely good Being, upon whom depends absolutely our existence and felicity, of whose superiority we are absolutely persuaded, as well as of his will and desire to be loved by us (§ 87), it follows, that we owe to him a love of devotion and obedience, which that it may be worthy or suitable to a most perfect Being, this rule or maxim immediately occurs, "That God, upon whom we absolutely depend, ought to be adored by us with all the vigour of our mind; and that to him ought to be rendered the most perfect and sincere obedience \*."

\* For since the veneration we pay to a superior Being ought to be suitable to it (§ 87); we cannot but hence infer that the highest veneration is due to the most perfect Being. And because God knows most perfectly, not only our external actions, but likewise all the inward motions of our mind; we owe to him, not merely external signs of veneration, but inward reverence and piety. And this is that worship and love which the sacred writings require of us.

## Sect. XCII.

A second  
axiom  
concern-  
ing love to  
ourselves.

Our love to ourselves must consist in satisfaction and delight in our own perfection and happiness (§ 80). Hence therefore we are obliged to pursue the

the preservation and augmentation of our perfection and happiness with all our might. But since the more perfect a being is, the more honour and obedience we owe to it (§ 87); we must take care that we do not love ourselves more than God, least our self-love should thus degenerate into immoderate and unproportioned selfishness. Whence flows this other maxim, "That man is obliged to omit nothing, that may conduce to preserve, promote, or augment his perfection and happiness, which is consistent with his love of God \*."

\* For God obliges man to seek after the enjoyment of good (§ 79), and therefore to promote and preserve his own happiness; because therefore sometimes goods are presented to him, of which one is greater than the other; and that lesser good which deprives us of a greater one, ought to be esteemed an evil, it is obvious that God obliges us to choose that which of many goods is the greatest.

Sect. XCIII.

Since moreover all men are by nature equal, and A third that natural equality requires a reciprocal obli-axiom gation to equal love (§ 88); the consequence of this is, that we are obliged to delight in the happiness of others, not less, but not more than in our own; and therefore to love others as ourselves; but ourselves not less than our neighbour. Whence flows a third maxim, "That man is obliged to love his fellow-creature no less than himself, and consequently not to do to any other, what he would not have him do to him; but, on the other hand, to do to another all those offices of kindness which he can reasonably desire them to render to him."

Sect. XCIV.

In fine, upon a due consideration of the pre-requisites to a principle of moral science which have been adequate.

This principle is true, evident and adequate.



been explained, we will find that this is the most genuine principle of moral science. Nothing can be more *certain*, it necessarily flows from the divine will and the nature of man; and, which is very satisfactory to me, it is authorized by the sacred writings. Nothing can be more *evident*, since it is such as may be easily conceived by the unassisted reason of every man, even among Pagans. Nothing can more *adequate*, for in fact we shall soon see, that there is no duty of a man as such, or of a citizen, which may not be easily and clearly deduced from this first principle.

#### REMARKS on this chapter.

I can't help thinking that our excellent author is not so distinct in this chapter as he ought to have been, and withal too tedious. It was indeed necessary to distinguish between the *principle which constitutes external or legal obligation*, and the *principle which is the medium of knowledge with regard to it; or the mean by which it may be known and demonstrated*. Now it is the will of God which constitutes external or legal obligation. But what is the medium by which the divine will may be known? Our author had already often said, that right reason is the faculty by which it may be known. But hence it follows, that conformity to reason, is the mean by which agreeableness to the divine will may be known and demonstrated. Why then does he dispute against those who say conformity to Reason, or which comes to the same thing, to our rational nature, is the principle or mean of moral knowledge? Or why does he not immediately proceed to enquire what is, and what is not agreeable to reason or our rational nature? Why does he dispute against those who in their reasonings about the laws of nature, infer them from the divine sanctity or moral rectitude, which must mean reason, or our rational nature compared with the rational nature of the supreme Being? For if the law of nature be discoverable by reason, conformity to reason, to the reason of God, and the reason of man, must be the *principle* of knowledge with regard to the law of nature. Nor can the divine sanctity or divine moral rectitude be an obscure idea, unless conformity to reason, or to a reasonable nature, be an obscure idea. Our author seems to have forgot what he said (§ 1), when he says (§ 86), that the happiness and perfection of mankind is not a principle from which the law of nature can be inferred; and what he here refutes, he afterwards (§ 77) returns to, as a necessary first principle in demonstrating the law of nature, *viz.* "That God intends the happiness and perfection of mankind." For if his reasoning,

(§ 77)

(§ 77) be just, the business of the moral science is to enquire what tends to the perfection and happiness of man, and what is necessary to it; and these will be good moral reasonings, which shew an action to be conducive to human happiness and perfection, or contrariwise: For thus they shew what the divine will commands, and what it forbids: nay, according to his reasoning in that section, we cannot advance one step in morals, without first determining what our happiness and perfection requires, and what is repugnant to it. He seems likewise (§ 70) where he says, "That the intrinsic pravity or goodness of actions, is not a sufficient principle for deducing and establishing the moral laws of nature," to have forgot what he had said in the former chapter, and frequently repeats in succeeding ones, of the *priority in nature* or *idea* of *internal* to *external* obligation. And indeed, to say that the laws of nature concerning human conduct, cannot be deduced from the consideration of the internal nature of actions, is in other words to say, that they cannot be deduced by reason; for it is to say, that they cannot be deduced from the conformity or disconformity of actions to reason. All I would infer from this is, 1. That it is impossible to make one step in moral reasonings, without owning a difference between conformity and disagreeableness to reason, and using that general expression, or some one equivalent to it; for the will of God cannot be inferred but from conformity to reason, or something equivalent to it, i. e. from some principle, which however it may be expressed, ultimately signifies conformity to the nature of things, or to reason. 2. That conformity to reason, to a reasonable nature, to moral rectitude, to the divine nature, and conduciveness to the perfection and happiness of a rational being, or conduciveness to the perfection and happiness of man, as such, and several other such phrases used by moralists, have and must all have the same meaning, or terminate in the same thing. 3. That to ask why a reasonable being ought to act agreeably to reason, is to ask why it is reasonable to act reasonably; or why reasonable is reasonable. This must be the meaning of that question, as it is distinguished from this other, "Is there good ground to think, that the supreme Being, the maker and governor of the universe, wills that his reasonable creatures should act reasonably, and will proportion their happiness according to their behaviour?" which question does likewise amount in other terms, to asking whether it is agreeable to supreme reason, to approve acting according to reason? There is therefore no necessity of dwelling long upon either of these questions in moral philosophy; but it is its business to enquire what rules of conduct, what methods of action are agreeable, and what are disagreeable to reason, to the nature of things, to the qualities of reasonable beings, to the perfection and happiness of mankind as such; all which phrases, as hath been said, must have the same meaning, and may therefore be promiscuously used: And indeed about them there can be no dispute, unless

one

one has a mind to make a particular favourite of some one of them in opposition to all the rest; in which case, the dispute, 'tis evident, will be merely about a phrase; as in fact, most disputes in the moral science really are, for that very reason, viz. through a particular liking to some favourite words.

Our author's method of reasoning is, when he brings it out, plain and just enough. It amounts to this, "If we own the being of a God, and have a clear and just idea of his perfection, we must own that he wills the perfection and happiness of all his creatures, his moral creatures in particular: man therefore being a moral creature, God must will the happiness and perfection of man. He must then for that reason, will that man pursue his own perfection and happiness. But such is the nature of man, and so are things relating to him constituted and connected, that the pursuit of his perfection and happiness consists in what may properly be expressed in one word, *Love*, the love of his Creator, the love of his fellow creatures, those of his own kind in particular, and the love of himself." Now according to this way of reasoning what our author hath to prove, is the latter proposition; and accordingly he goes on in the succeeding chapters to prove it.

In other words, our author's manner of deducing human duties amounts to this, "Every obligation which man can be under as a rational agent, *external* or *internal*, may be expressed by one word, *Love*. For we can owe nothing to any being but love: all our obligations must therefore be reducible to these three; the love of our Creator, the love of our fellow-creatures, of those of our own kind, or with whom we are more nearly and immediately connected in particular; and the love of ourselves." And accordingly our author proceeds to explain the duties belonging to these three classes. The principle upon which he founds may justly be called clear, certain, and adequate. For if there be any such thing as obligation upon a rational agent, external or internal, it can be nothing else, but obligation to love: internal obligation can belong to nothing else but the dictates and offices of reasonable love; and therefore external obligation can belong to nothing else. Wherefore love is justly said in the sacred writings, to be the fulfillment of the law; of the law of nature, of the law of reason, of the law of God. But let me observe, that this method of our author's, is the same in other words with some of them he refutes. For is it not evidently the same thing as to say "that duty, obligation, or what is reasonable with regard to human conduct, must be inferred from the human nature, and the constitution of things relative to him. But according to the frame of man and the constitution of things, the chief happiness and perfection of every man arises from the love and the pursuit of order within and without him; or from the observation of the prevalency of wisdom and good order, and consequently of greater happiness in the administration of the universe; and from such an orderly discipline of his affections

affections as tend to produce universal happiness, order, and perfection, as far as his affections, and the actions they lead to, have any influence? According to which state of the question, the remaining enquiry will be what the love of good order and general happiness requires.

# CHAP. IV.

*Of the application of this rule to actions, and the differences of actions proceeding from thence.*

## Sect. XCV.

HAVING considered the nature of human free actions; and the rule according to which they ought to be regulated; the next thing to be considered, is the application of this rule to free actions. The application of a law to a fact is called *imputation*, and therefore we shall in this chapter treat of it.

## Sect. XCVI.

*Imputation* being the application of a law to a fact (§ 95), which cannot be done otherwise than by comparing a law and a fact; i. e. by two propositions compared together, and with a third by a syllogism; the consequence is, that *imputation* is a syllogism or reasoning, the major proposition of which signifies a law; the minor a certain action: and the conclusion is the *sentence*, with regard to the agreement or disagreement of the action with the law \*.

\* To *impute*, properly signifies to place something to the account or charge of another person. Sen. epist. 8. "Hoc non imputo in solutum de tuo tibi." Now as that can't be done without ballancing accounts with one, hence it came about, that this term seemed proper to express that application of a law to facts; which is done in like manner by a similar comparison. Thus when, as the story is told by Livy, Horatius had killed his sister, and a question

arose,



arose, whether the law against murder, ordaining that the person guilty of it should have his hands tied, and his head veiled, and be whipped either within or without the walls, and then be hanged upon a tree, ought to be applied to that action? The Duumviri legally appointed by Tullius Hostilius the king, to judge of the matter, were of opinion, that the law extended to the fact, upon which one of them pronounced this sentence: "I find you, Publius Horatius, guilty of murder. Go, licitor, bind his hands." But Horatius appealing, and the father himself appearing for him, the people absolved him. The Duumviri therefore reasoned in this manner, "He who knowingly with evil design kills a person, is as a murderer to be punished so and so. This is the law. Publius Horatius by running his sister through with his sword, has willingly and with evil intention killed a person. This is the fact. He is therefore to be punished so and so. Here is the sentence." But the people computed or stated the account in another manner thus: "He who kills an enemy to his country, is not to be punished as a murderer. Here is the law. Publius Horatius in killing his sister, killed an enemy of her country. Here is the fact. Therefore he ought not to be punished as a murderer. Here is the sentence, and it is a sentence of absolution." The Duumviri therefore imputed the fault to Publius Horatius, but the people did not impute it.

## Sect. XCVII.

Wherein  
it differs  
from con-  
science.

Having said much the same thing above concerning *conscience* (§ 94), which however is not the same with *imputation*, let us observe wherein the difference between them consists; and it lies in this: Whereas conscience is a reasoning about the justice and injustice of one's own actions: imputation is a reasoning about the agreement or disagreement with law of another's actions. In the first case, every one is his own judge: in the other, another person judges of our actions, and compares them with the law \*.

\* But because it does not belong to every one to judge of the actions of others, and yet such is the weakness of human nature, that most persons are very indulgent to their

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their own faults, and not very severe in searching their own consciences, and yet are very quick-sighted and rigid with regard to the failings and blemishes of others; it is no wonder that judging others is reprehended as unjust and wicked, not only by our Saviour, Matt. vii. 1. Luke vi. 37. and by his apostle, Rom. ii. 1. xiv. 4. 1 Cor. iv. 5. but likewise by profane writers, who had only right reason to guide them in their determinations. Hence the pleasant witty fable of the two budgets, one of which filled with his own faults a man carried on his back, the other filled with the faults of others he carried on his breast: To which Phædrus subjoins this moral, fab. 4. 9. v. 4.

*Hac re videre nostra mala non possumus:*

*Alii simul delinquant, censores sumus.*

Several parallel passages of ancient authors are collected by If. Casaubon, ad Pers. p. 340. and by learned men upon this fable, whose coffers we will not pillage.

Sect. XCVIII.

Every application of law to fact is called *imputation* (§ 9), whether an action be compared with the divine law or with a human law; and in like manner, whether God himself, or men, whose office it is, apply law to a fact. The former, however, moralists are accustomed to call imputation *in foro divino*; the latter in *foro humano*. But there is this very considerable difference between the two, that in the latter none suffers punishment for thoughts, l. 18. D. de poenis; but God being omniscient, and requiring internal obedience (§ 91), he justly imputes to us even thoughts which are disagreeable to his law \*.

An action is imputed either by God or by human judges.

\* The ancient philosophers were not ignorant of this truth, and have asserted that God seeth not only all our outward acts, but likewise our most secret thoughts. So Thales Milesius, Socrates, Plato and his followers, Pythagoras and his disciples, and all in general who entertained juster and sublimer conceptions concerning God. Testimonies to this purpose are collected by Huet. in qu. Alnet. ii. 2. 16. Hence we see, how reasonable the interpretation of the Mosaic law is, which our Saviour gave, Matt. v. 22, 28.

## Sect. XCIX.

And then  
man is  
declared  
to have  
merited  
either pu-  
nishment  
or reward.

Further, whereas the law which is applied to human actions is enforced by a sanction (§ 64), hence it follows, that *to impute* is the same as to declare, that the effect which a certain law assigns to an action, agrees to such a particular action. This effect is called in general *merit*; *punishment*, if the effect of an action exhibited by the law be evil; and *reward*, if the effect be good \*.

\* But since a legislator is not obliged to propose rewards, hence it is manifest that even actions in themselves just are not meritorious. To this purpose belongs that remarkable saying of Christ: "So likewise ye, when ye shall have done all these things which are commanded you, say, we are unprofitable servants: we have done that which was our duty to do, *Luke* xvii. 10." But if a law-giver promises rewards, as God has done, who has enacted his laws, not for his own sake, but for the advantage of mankind, because he wills their perfect happiness (§ 78); rewards may be said to be merited, not in respect of the law-giver, who of free-goodness proposed them, but in respect of imputation.

## Sect. C.

The defini-  
tion of  
imputa-  
tion and  
axioms re-  
lative to it.

*Imputation* therefore is a reasoning by which an action of another person, being, in all its circumstances, compared with a law, whether divine or human, is declared to merit, or not merit a certain effect proposed by a law. From which definition it is manifest, that we cannot certainly pronounce whether an action be imputable or not, unless we have a distinct comprehension both of the law and of the action in all its circumstances: and that one circumstance often alters the whole state of the case.

## Sect. CI.

It suppo-  
ses the  
know-  
ledge and  
interpre-  
tation of  
the law.

Since the *law* must be known to him who would form a right judgment of the imputability of actions, the consequence is, that he ought to be sure there is a certain law, and ought rightly to under-stand

stand the whole of that law, and therefore to *interpret* it rightly, if it be conceived in concise or obscure terms; *i. e.* he ought distinctly to comprehend the mind of the law-giver declared by words, or by whatever other signs.

\* Interpretation therefore does not properly belong to the law of nature, but only to positive laws, whether divine or human. For since legal interpretation is a distinct representation of the law-giver's mind, declared by words or other signs (§ 101): and the law of nature is not conceived in words, but is promulgated by right reason (§ 11): it follows, that the mind of the supreme law-giver cannot be collected from words or other signs; and therefore this law does not admit of interpretation. Reason sufficiently understands itself without an interpreter. Arrian. *Diff. Epict.* 1. "The reasoning faculty being conscious to itself, clearly perceives what it is, and what it can do, and of what price and value it is, if it applies itself to the direction of our other faculties."

Sect. CII.

Seeing an *interpreter* represents distinctly the law-giver's meaning, declared by words or other signs; <sup>Its foundation.</sup> it follows, that in interpreting laws, great attention must be given both to the proper and the metaphorical signification of words; to their connection with what precedes and what follows, and to the nature and character of the subject itself; and yet more especially to the scope and intention of the law-giver, which induced him to enact the law; wherefore they judge well, and we agree with them who assert the reason of the law to be its spirit or soul. See our preface ad Elem. Pandect.

\* We have a remarkable example of the utility of this rule in our Saviour's explication of the law about the sabbath, when he was censured by the Jewish doctors for teaching, that works of charity and mercy ought not to be intermitted on the sabbath-day. He on that occasion shews the source whence the interpretation of that law must be brought. He says, "The sabbath was made for  
F 3 man,



man, and not man for the sabbath, *Mar. ii. 27.* From which reason of the law it clearly follows, that all works which tend to disturb the tranquillity and piety of mankind were forbidden to be done on that day ; but not such as conduce to human preservation and happiness. But take away this sole and adequate reason of that law, and it is most certain that in the words of the law themselves, there is nothing from which one would have inferred our Saviour's doctrine.

## Sect. CIII.

Its various  
forts.

Further, since the reason of a law is as it were its soul, hence it must follow, that the law ceases when the sole reason of it wholly and absolutely ceases: that if it do not agree to a certain case, that case cannot fall under the law on account of the very reason of the law ; and this is the foundation of what is called *restrictive interpretation*; to which may be rightly referred *equity*, *i. e.* a power of correcting the law in respect of universality: *Grot. de Æquit. indulg. & facilit. c. i. n. 3.* that if the words of a law do not quadrate with a certain case, and yet the reason of the law be applicable to it, then there is place for what is called *extensive interpretation*: Finally, that when the words and reason of the law keep as it were pace together, then there is only room for *declarative interpretation* \*.

\* For example, our Saviour interprets the law of the sabbath restrictively ; the laws concerning adultery and homicide extensively, *Mat. v.* which not being done by the Pharisees, they reasoned ill concerning the imputation of actions. Hence it was, that they accused the apostles of impiety for plucking ears of corn on the sabbath ; and our Saviour himself for healing the sick on the sabbath ; and that they reputed those righteous who fulfilled the traditions of the Rabbins, and washed, *e. g.* their cups carefully, paid tithes, gave alms to the poor, fasted frequently, though they did all this thro' vain-glory, neglected the weightier matters of the law, and committed gross crimes.

Sect.

## Sect. CIV.

Besides, because the law is interpreted either by the legislator or judge, or some other, to whose office it belongs to apply the law to facts, or by a lawyer, interpretation on these accounts is therefore called *authentic*, *customary*, or *doctrinal*; the foundation of the first is the will of the legislator; of the second, practice in courts of justice; and of the last, the application of the rules of interpretation abovementioned \*.

\* We have examples of all these three in the sacred writings: Thus, after God, *Numb. xxvii. 7.* had given this law: "If a man die and have no son, then ye shall cause his inheritance to pass unto his daughter," the supreme legislator himself adds this interpretative clause, *Numb. xxxvi. 5, 6.* "So shall not the inheritance of Israel move from tribe to tribe." This is an example of *authentic* interpretation, which is frequently the same as a new law: We have an instance of *customary* interpretation, *Ruth iv. 7.* where the plucking off and casting the shoe, which was originally restricted to a particular case, *Deut. xxv. 7.* is by judicial interpretation extended to rejection of inheritance; with relation to which custom we have a curious disquisition by An. Bynæus de Calc. Heb. l. 2. c. 7. Finally, there is an instance of *doctrinal* interpretation, *Nehemiah viii. 13.*

## Sect. CV.

Because he who would interpret a law aright, ought to know all the circumstances of the fact, (§ 108), and the principal circumstance is the person acting; hence we conclude, that an action is to be imputed to him who is the author or cause of it; and, on the contrary, imputation ceases if any thing be done, of which the doer is neither the cause nor the author, tho' we sometimes impute the merits of one to others; which imputation is commonly called *imputation by favour*, in contradistinction to that which is of *debt* or *merit*, strictly so called. Puffend. de jur. nat. & gent. l. 9. 2.

\* And this is the origine of hereditary nobility; yea, sometimes of hereditary kingdoms. Thus among the Germans, the distinguishing nobleness, or the eminent services of fathers, gave dignity even to striplings, Tacitus, de moribus Germ. c. 13. And of hereditary kingdoms, Polyb. Hist. 6. 5. "This is the origine of hereditary sovereignty: hence it is, subjects obey for a long time, not only kings but their Offspring, through a persuasion that being descended from them, and educated by them, they will be like to them in temper and disposition."

## Sect. CVI.

What actions are not imputable.

If therefore an action be imputed to none, unless he be the cause or author of it (§ 105); but a person cannot be called the author of any action which is not *human*; i. e. which is not done by the will, under the direction of the understanding (§ 30); hence it is obvious, that neither passions, nor natural actions, nor events wholly providential, nor things done in a fit of madness, nor natural imperfections either of body or mind, nor things done in sleep or drunkenness can be imputed to any person, but so far as it depended upon the agent to prevent them (§ 26, 29, 49) \*.

\* Thus impudence is imputed to one, if he neglect the decorum with regard to natural actions. Thus shipwreck is imputed to the commander of the ship, if by his fault the ship was lost; whereas in other cases, what can be more true than what Tacitus says, Ann. 14. 3. "Who is so unjust as to make a crime of what the winds and waves have done?" Thus deformity is imputable to one who has sacrificed his nose to Venus, whereas in other cases Phædrus justly pronounces, Fab. 3.

*Sed quid fortunæ, fulte, delictum arguis?*

*Id demum est homini turpe, quod meruit pati.*

Much more reasonably still is ignorance imputed as a fault to a man who had opportunity of a good education in his youth, which is not reckoned criminal in the vulgar; yea, dreams are imputed, which are occasioned by waking thoughts and actions throughout the day; of which kind of dreams called by the antients *ἐνύπνια*, according to Macrobius in Somn. Scip. 1. 13. Claudian justly asserts,

*Omnia*

*Omnia, quæ sensu voluntur vota diurno,  
Pectore sopito, reddit amica quies.*

*Furto gaudet amans, permutat navita merces,  
Et vigil elapsas quærit avarus opes.*

Hon. Aug. Præf. v. i.

To which Gasp. Barth, in his notes, p. 714. has added more examples. In fine, wilful drunkenness, and the actions perpetrated in that condition, are imputed for a reason that needs not be mentioned, it is so obvious.

Sect. CVII.

As for what relates to ignorance and error, since whether both these imperfections of the understanding are actions either *culpable* or *inculpable* (§ 48, 49), *vincible* or *invincible*, *voluntary* or *unvoluntary* (50), it follows <sup>done thro' ignorance or error</sup> from the same principles, that inculpable, invincible, involuntary ignorance cannot justly be imputed to a <sup>be imputable</sup> person; but that an action done thro' culpable, vincible, and voluntary ignorance is justly imputable; and the same holds with regard to error: much less can ignorance or error be any excuse to one, if the action itself be unlawful, or be done in an unlawful place, time, or manner; because, in such cases, it not only was in the agent's power not to be ignorant or not to err, but he was absolutely obliged to omit the action \*.

\* Judah, when he went into Thamar his Daughter-in-law, could not plead ignorance, because the action was in itself unlawful, Gen. xxxviii. 15, 16. Nor is he excusable, who sporting with darts in an unlawful time and place, ignorantly wounds a man, because an action done in a place and time in which it ought not, is in itself unlawful, § 4. Inst. de lege Aquilia. Nor is an injury done to one who was pruning a tree near the highway, if he be charged with killing a man, whom he might have saved by calling out to him, § 5. instit. eodem. Those who were thus employed among the Romans used to cry aloud *cave*, take care: among the Athenians *φύλαξεαι*, as Theod. Marcil. ad § 5. instit. eod. shews. Wherefore the sentence of the Areopagites mentioned by Aristot. mag. mor. I. 17. absolving a woman who killed a young man by



by a love-charm which she gave him, because it was not done designedly, having given him the draught out of love, and missed her aim, was blameable, since it proceeded upon a supposition that it was not unlawful to give such love-making medicines. How much more justly does the Roman lawyer Paullus, l. 38. § 5. D. de pœnis, condemn such practices, as giving medicines to create love or abortion: Qui abortionis aut amatorium poculum dant, etsi dolo non faciant, tamen quia mali exempli res est, &c.

## Sect. CVIII.

Of error  
in fact  
and in  
law.

Further, one may err either in point of *fact* or in point of *law*. To the former belong the rules already laid down (§ 107), because a circumstance in a fact may escape the most prudent persons, and therefore his error, in point of fact, may be *inculpable, invincible, involuntary*. But error, in point of law, with relation to the law of nature, does not excuse, because right reason promulgates this law to every one, unless, perhaps, when age, stupidity, and the more subtle nature of a particular law dictate a milder sentence. But as for civil law, ignorance of it is so far imputable, as it is so framed and promulgated that the person might know it \*.

\* For who would rigidly exact an accurate knowledge of the law of nature from infants, or those hardly arrived beyond the infant state, from deaf and dumb persons, from changelings, or from stupid persons brought up among the brutes? Besides, tho' the law of nature be as it were written or engraved on the minds of men, yet it cannot be otherwise known than by reasoning about just and unjust (§ 15): now, because some precepts of the law of nature flow immediately from clear principles of reason, others are derived from principles of reason by many intermediate steps, and a long chain of reasoning, none can doubt that precepts of the first sort may be known by every person who is not quite stupid; whereas those of the latter sort are more difficultly understood, and require a more improved and perfect understanding. Hence by the Roman law, tho' it reckoned incest forbidden by the law of nations, l. 38. § 2. D. ad L. Jul. de adult. c. 68. D. de rit.

rit. nupt. yet the punishment was sometimes mitigated, both with respect to men and women; as, for instance, if a son-in-law should after divorce lie with his mother-in-law, l. 38. § 5. D. ad L. Jul. de adulterio: of which no other reason can be given but because the unlawfulness of incest cannot be inferred immediately, or without a long train of reasoning from the principles of natural law.

## Sect. CIX.

Since the free will of man must concur to render Whether an action such of which one can be called the author undesign- and cause (§ 30); but unintended actions are such, ed and that they do not proceed from the determination of forced ac- the mind (§ 58); hence it follows, that an action imputa- ble. which one does against his will, or without inten- tion, cannot be imputed to him; on the contrary, whatever is done spontaneously, is imputable, and much more whatever is done of one's own free accord: yea, what one is forced to do is imputable to him, if he who forced him had a right to force him; but not, if he who forces him was not in the exercise of his right, or if the person forced was, previously to the force used, under no obligation of doing it\*.

\* Because, tho' a person compelled or forced wills (§ 58), yet *right* and *obligation* are correlates, which mutually found or destroy one the other (§ 7); and therefore, when *right* ceases, *obligation* must also cease: the consequence from which is, that if the one hath no right to compel, the other can be under no obligation to do what he was unjustly compelled to. Hence it is, that the promise of a stubborn debtor, extorted by the magistrate by threatening execution is valid, because the magistrate is in the exercise of his right when he forces stubborn debtors to pay: But if a robber forces a traveller to promise him a certain sum of money, because the robber hath no right to force him, the traveller can be brought under no obligation to perform what he was thus compelled to promise. To this effect is that famous Epigram of Martial.

*Quid si me tonsor, dum curva novacula supra est,  
Tunc libertatem divitiasque roget?*

*Promittam,*

*Promittam, nec enim rogat illo tempore tonsor,*

*Latro rogat: res est imperiosa timor.*

*Sed fuerit curva quum tuta novacula theca:*

*Frangam tonsori crura, manusque simul.*

Epig. 11. v. 5.

Sect. CX.

Whether  
bodily  
constitu-  
tion, ha-  
bit, &c.

But seeing neither temperament, affections, propensions, habits, nor external force, hinder the free exercise of the will (§ 54 & seq.) it is abundantly manifest, that neither bodily constitution, which hath so great an influence commonly on the affections of the mind, nor passions, however impetuous and vehement, nor habit, tho' become a second nature, can hinder the imputation of an action; tho' sometimes, in human courts, he be reckoned an object of just commiseration, who was transported into a bad action by the violence of just grief, or any afflictive passion\*.

\* It is easier, as Aristotle has observed, to resist lust, or any voluptuous appetite, than the afflictive passions. See Nicomach. 3, 12. 3, 15. 7, 7. Mag. moral. 2. 6. The same is observed by Marcus Antoninus, *ἐν ταῖς ἐπιθυμίαις*, 2. 10. So that one cannot but wonder to find Aristotle, as if he had forgot himself, asserting, ad Nicom. cap. 2. "That it is more difficult to resist the impulses of pleasure than of anger," since to be deprived of pleasure is only a privative evil, and that only for the greater part but apparent, not real; whereas to feel pain is a positive, and very frequently a real ill. Who does not think parricide more to be imputed to Nero, who was not excited to that wickedness by any afflictive passion, but by mere cruelty and wickedness, than to Orestes, who giving the reason why he killed Clytemnestra, says, *Now is she who betrayed my father's bed killed.* Eurip. Orest. v. 937.

Sect. CXI.

Whether  
actions ex-  
torted by  
some are  
imputa-  
ble?

Hence it is easy to see whether one be in any degree excusable, who being overpowered by fear, to which the bravest mind may succumb, commits any

any action contrary to law. For if the fact be such that there is no room to plead necessity, in vain is it pretended. But in what cases necessity cannot be pleaded, we shall enquire more accurately afterwards.

\* Truly, if any thing be commanded contrary to piety and justice, that then no pain or force ought to be yielded to, both the scriptures and reason teach. This is acknowledged by several Pagan writers. So Juvenal, § 8. v. 80.

*Ambiguæ si quando citabere testis,  
Incertæque rei: Phalaris licet imperat, ut sis  
Falsus, & admoto dictet perjuriam tauro,  
Summum crede nefas, animam præferre dolori,  
Et propter vitam vivendi perdere causas.*

Sect. CXII.

Whensoever the understanding and will, and the physical motion of the body concur to an action, then he who does it is called *the physical cause of the action*; but if the mind alone acts without any corporeal motion, he is called *the moral cause*. Sincere therefore understanding and will are the only principles of human actions (§ 30), hence it follows, that an action is no less imputable to the *moral cause* than to the *physical cause*, if the concurrence of the will and understanding in both be equal; more imputable to the *moral* than to the *physical cause*, if one induces another, who is under obligation to obey him, to act, by commanding or compelling him; less imputable to the *moral* than to the *physical cause*, if one concurs with the action by advice or approbation only \*.

\* Hence that distinction of Hen. Koehlerus, in his Exercit. juris natur. § 108. & seq. between *efficacious will*, when the effort is sufficient to produce or suspend the action, and *inefficacious will*, when the effort alone is not sufficient, is to be admitted as of great use: wherefore, if the will of the moral cause be *efficacious*, the action is justly imputed to him; and in proportion as the will is more or less such, the



the action is more or less imputable to one. For who doubts, for instance, that if a father command his son to steal, the theft is more imputable to him than to a stranger, either commanding or persuading to do it?

## Sect. CXIII.

Whether  
the condi-  
tion of the  
agent con-  
tributes a-  
ny thing  
toward  
imputabi-  
lity.

To the circumstances of the person to whom an action is imputable (§ 105), belong his dignity, rank, and quality; and therefore it is indisputable, that when many persons concur in the same action, if the action be just it is less imputable, and if the action be unjust, it is more imputable to him whom relation, prudence, duty, age, dignity, ought to influence to good conduct, and restrain from bad, than to a stranger, an ignorant, stupid person, one under no particular tie, a boy, a stripling, or, in fine, a person of no rank or dignity.

\* Thus, whatever good service was done to a relative, the ancients called a *good office*, what was done to a stranger they called a *benefit*. Seneca de Benef. 3. 18. The latter is more imputable than the former. On the other hand, an injury done to a father by a son, whom filial duty ought to have restrained from such a crime, is more imputable than one done by a stranger is to him. And who does not blame the faults committed by a prudent person well instructed in the thing, more than those done by a stupid ignorant person: those committed by a person of age and experience, or even by a man arrived at the years of discretion, than those done by a youth: those committed by a theologue skilled in sacred matters, than those done by an illiterate person: those, in fine, committed by a person of distinction, or placed in any honourable station, more than those done by a vulgar person of lower life? So Hieronymus in Ezech. 2. Salvianus de gubern. Dei, p. 118. and so likewise Juvenal in these well known lines.

*Omne animi vitium tanto conspectius in se  
Crimen habet, quanto, qui peccat, major habetur.*

Sat. 8. v. 140.

Sect.

## Sect. CXIV.

Since, in the imputation of actions, regard ought to be had not only to the person of the agent, but to all the other circumstances; but that concurrence of circumstances in the object, of time and place, together with sufficient abilities, without which an action cannot be done, is called *occasion* or *opportunity*; it follows necessarily, that he is not excusable whom occasion tempts to commit any crime; nor he who loses the opportunity of doing a good action thro' indolence or negligence; but an omission of an action is not to be imputed to one who had no opportunity of doing it\*.

\* For the occasion of committing a fault or temptation to it, ought to be avoided; and one ought to resist the allurements of vice. He who does it not is blameable, if he yields to sinful appetites or passions. He is therefore the author and cause of that action; and it ought to be imputed to him. It is therefore a wretched excuse Chæreas offers for himself in Terence: "Should I lose so desirable, a so much longed for, so favourable an opportunity?" For he suffered himself to be tempted to sin. On the other hand, how blameable the not taking hold of an opportunity of doing well is, Christ elegantly sets forth to us in the parable of the servants, *Matt.* xxv. 14.

## Sect. CXV.

Much less then can the omission of these actions be imputed to one, which are either impossible in the nature of things, or contrary to laws and good manners, or at least which he had not sufficient ability to perform, except so far as one had weakened the abilities with which he was endowed by his own fault, or had rashly, with bad intention, promised what he might have foreseen to be impossible for him to perform.

\* Hence it is plain, why a debtor who had squandered his estate is still liable, and is not excusable on account of his indigence, because he reduced himself by his own fault: and

and why an alchymist, who had promised mountains of gold, when he was found to have deceived, was as justly condemned of fraud, as one who had knowingly, and with evil intention promised a treasure. See an example in Tacitus; Annal. 16. 1. in the story of Cefellius Bassus.

## Sect. CXVI.

What actions are good, and what are evil?

Moreover, actions compared in this manner with a rule of action, take different names. If they, in all their circumstances, be agreeable to right reason, not obliging by external obligation; or to internal obligation merely (§ 7), they are *good*; but if in one or more circumstances they deviate from right reason to whatever side, they are *bad*. From which definitions it follows, that an action must be both materially and formally good (as the schools speak) in order not to be classed with bad actions \*.

\* Hence the largesses, the fastings, and all the austerity of the Pharisees were not good actions, tho' *materially* conformable to right reason, because not done from a good motive, but from ostentation and vain-glory. We ought not only to do good things, but we ought to do them in a right manner. The just man is rightly described by Philémon in Stobæus, Serm. 9. thus: "Not he who does good things in whatever manner he does them, but he who sincerely desires not merely to be thought, but really to be upright in all his conduct, is good."

## Sect. CXVII.

What actions are just, and what are unjust?

Again, if we compare actions with a law; those which are in all things agreeable to law are *just*; those which are, in any one circumstance, disagreeable to law, are *unjust*, and are therefore called *finis*. Whence we may learn why St. John places all sin in *avopuα*, i. e. a transgression of a law.

## Sect. CXVIII.

The difference between just and honest

Finally, since the divine law or will obliges us to *love* (§ 79), and love is either love of *justice*, or love of *beneficence* (§ 82), an action agreeing in all

all circumstances with the love of justice, is a *just* action, and one ever so little repugnant to it, is an *unjust* action; but those which proceed from the love of humanity and beneficence, are called *honest*, and those which are not agreeable to that love, are called *dishonest*, *base*, *inhumane*; and hence it is easy to understand wherein the difference lies between *expletive* and *attributive* justice.

## REMARKS on this Chapter.

Our Author's positions concerning the interpretation of laws, and the imputation of actions *in foro humano*, are very clear and just. But it may not be improper to add the following observations concerning the effects of ignorance and error *in foro divino*, *i. e.* with respect to the good and bad consequences of actions occasioned by ignorance or error, according to the laws of God in his government of the world.

1. It must be as true in morals as it is confessed to be in mechanics, that deviation from truth will lead into a wrong manner of acting; and all action must be liable to all the consequences of the laws of nature, *i. e.* to all the consequences connected with it in the regular and wise constitution of things, according to which every cause operates, means are proper and effectual, and different operations have different effects. And in fact we know no mistakes in action through ignorance, rash judgments, or whatever way it happens, which do not produce hurtful consequences; insomuch that there is good reason to conclude, that more of the misery of mankind is owing to wrong methods of action which are the effects of ignorance or error, than to any other cause. It must be true in general, that in a world governed by general laws; or in which connexions are invariably established, every deviation from truth, every mistake about the connexions of things in it, must be in some degree hurtful.

But, 2. Since all the interests of intelligent agents require government by general laws, or fixed connexions which operate invariably, the government of the world will be perfectly good, if the connexions or general laws which constitute it are the best adapted that may be, to promote the greater good of rational agents in the sum of things. Now, that it is so, must be certain, if the being and providence of an infinitely good God can be proved *à priori*. And there is sufficient reason to conclude that it is so *à posteriori*, because the more examples we find by enquiring into the government of the world, of such good general laws, the greater is the presumption that the whole is governed by the best general laws. But the further we enquire, the further we search, the more and clearer instances do we find



of good, of perfect government. See my *Principles of Moral and Christian Philosophy*.

3. Our great business therefore is to endeavour to acquire just notions of the connexions of things ; or of the good and bad consequences of actions, in order to act agreeably to them. If getting knowledge to direct our conduct were not in our power, directing our conduct could not be in our power : wherefore, if ignorance, want of knowledge, error, false notions or judgments be not imputable to us, wrong actions are not imputable to us. So that ultimately, whether we speak of the imputation of actions in the juridical stile, or in other words, as we have now spoken of it, (both of which must mean the same thing) it is ignorance or error in judgment that is imputed, when action is imputed ; it is ignorance or error that brings evil upon us, when wrong action does it ; because every action is directed by our present opinion and judgment, and the affection corresponding to it. And for that reason, our chief business, interest and duty, must be to have just or true ideas of the nature and consequences of actions ; or of the connexions of things, according to which our actions ought to be regulated, since it is according to them that actions have certain effects or consequences.

4. False judgments, which tend to direct into a wrong course of action, or to introduce a wrong temper into the mind, must, (as hath been said) be hurtful. But, on the one hand, it is as sure as that there is a God, and that the world is governed by good laws, for the greater general good of the whole, that a virtuous reasonable temper, and virtuous reasonable conduct, are, upon the whole of things, the most advantageous course of acting. It is so in fact in the present life considered by itself without any regard to futurity ; and it must be so in a special manner in a future state. And, on the other hand, it is as sure as that there is a God, that no opinions, tho' false, which do not tend to corrupt the temper, or to lead into a wrong course of action, can render us obnoxious to the divine displeasure, can be provoking to him, as such, if the bent of the heart be sincerely towards truth and right ; or can as such involve in any hurtful consequences appointed to be punishments of false opinions, not tending to corrupt the temper, nor to lead to vitious behaviour ; and not proceeding from want of love to truth and right in any degree, or from want of impartial, honest diligence, as far as that is in our power, to find out truth and avoid error.

How moral conscience, or our sense of right and wrong may be, and only can be impaired, corrupted, or overpowered, is explained at great length in the *Enquiry concerning virtue*, Characteristicks, T. 2. p. 40, &c. And to improve it, and preserve it pure and untainted, must be our chief duty and interest. Enquiries therefore into right and wrong conduct are of the utmost importance. They are enquiries into the natures and consequences of things, and are in that sense *philosophy*. But which is more, they are enquiries into the natures and consequences of things

things which ought to direct our conduct; and therefore they are *moral philosophy*, or compose the science of life, the science of right conduct, the science and art of living suitably to our nature and rank, suitably to our dignity; agreeably to the will of our Creator, manifested by the connexions of things established by him; and agreeably to our own best interest. For this must be certain, that it is the established connexions of things which constitute our best interest. And if the established connexions of things be according to the best order, acting according to virtue or the best order, must be in the sum of things our best interest. And why should we doubt that it is really so in a future state, and for ever, since it is really so at present, even while virtue is but in its first state of education, culture and discipline; since the compleat natural effect of highly improved virtue cannot take place till virtue be brought to a great pitch of perfection by gradual culture, because the effect cannot precede the cause. But that virtue is our best interest, as well as acting according to the best order, and easily discoverable to be such, will appear as our author proceeds in his deduction and demonstration of particular duties or virtues. I thought it proper to add this remark, as well on account of those who speak vaguely and loosely about the imputability of ignorance and error, as of those who maintain opinions which result in asserting, That sincere love of truth, and impartial diligence to discover it, is not the best temper, the best part we can act, nay, all the good within our power, with regard to knowledge, speculative or practical. And if this be not the temper and conduct which leads to happiness, according to the constitution of things, what a terrible, what a wretched constitution of things must it be!

## CHAP. V.

### *Of the duties of man to God.*

#### SECT. CXIX.

**H**itherto we have but premised some of the first principles of the beautiful moral science; let us now proceed to consider the *offices* or *duties* which the *law of nature* prescribes to mankind; to all and every one of the human race. What the Greek philosophers called τὸ Δείον, and the Stoics τὸ καθήκον, Tully afterwards, in explaining this part of philosophy in the Roman language, called

A Transition to the doctrine of duties.

*officium*, not without deliberating about the matter a long time, and consulting his friends \*.

That the Stoics called it τὸ καθήκον, and held the doctrine of *duties* as the chief part of moral philosophy, we are assured by Diogenes Laertius, who has not only briefly and clearly explained the chief precepts of the Stoics with relation to human duties, but has likewise commended their treatises on the subject, as that of Zeno, l. 7. 4. of Cleanthes, cap. 7. of Sphærus ibidem, &c. Plutarch mentions a book of morals by Chrysippus de repugn. Stoic. Cicero mentions one of Panætius upon duties (de off. 3. 2.) and in his letters to Atticus, 16. 11. he speaks of one by Posidonius. When, after their example, Cicero had wrote a treatise of the same kind in Latin, after long deliberation what title to give it, all things duly considered, he could not find a more proper word to express the τὸ καθήκον of the Stoics than the Latin word *officium*. So he writes to Atticus, 16. 6. “Quod de inscriptione quæris, non dubito, quin καθήκον *officium* sit, nisi quid tu aliud. Sed inscriptio plenior de officiis.

## Sect. CXX.

Office or  
duty de-  
fined.

By *office* or *duty* I understand an action conformable to the laws, whether of perfect or imperfect obligation. Nor can I entirely approve the definition given by the Stoics, who say, it is an action, for the doing which a probable reason can be given; or, in other words, an action which reason persuades to do \*. Diog. Laert. 7. 107. 108. Cicero de finibus, l. 3. 17.

\* For since nothing is done even rashly, for which a probable reason may not be given, whatever is done, not only by men, but by brutes, may be called *officium*, *office* or *duty*. And thus the Stoics understood the word, of whom Laertius says, l. 7. 107. “They extended the word to plants and animals, for with regard to these there are offices.” It is true, an office ought to be founded upon a reason, but it ought to be a reason which is proper to determine men to act or forbear acting, and not brutes, i. e. an obligatory reason.

Sect.

## Sect. CXXI.

But since office or duty means an action conformable to law, it is plain that duty cannot be conceived without a law; that he does not perform a duty, who imposes upon himself what no law commands; that an action ceases to be duty, when the law, or the reason of the law enjoining it ceases; and that when a law extends to certain persons only, of two persons who do the same action, the one performs his duty, and the other acts contrary to his duty \*.

The nature of duty.

\* It is proper to illustrate these propositions by examples. None will say that Origen did a duty when he emasculated himself, whether by an instrument, as Hieronym. relates, ep. 65. or, as others have narrated, by medicines. Epiph. Haer. 64. For there is no divine precept commanding it, inasmuch that Origen himself afterwards acknowledged he had misunderstood that passage in St. Mat. xix. 12. See Huet. Origeniana I. 1. 13. p. 8. None will deny that a christian would act contrary to his duty, if he should not submit to the law of circumcision, or offer sacrifice to God, tho' formerly both were duties, Gal. iii. 23, 25. iv. 3, 4, 5. 2 Col. ii. 20. Heb. ix. 9, 10. Finally, if a priest usurps the office of a judge, he acts contrary to his duty, and is guilty of intrusion into a charge not committed to him; whereas a judge doing the same action, does his duty, 1 Peter iv. 15.

## Sect. CXXII.

The obligation binding one to do his duty being either perfect or imperfect (§ 120), *duty* must likewise be divided into *perfect* and *imperfect*; the former being done in obedience to perfect obligation, or a law; the other being performed in consequence of imperfect obligation, or from virtue \*.

Duty divided into perfect and imperfect.

\* Accordingly, to do hurt to no person, to fulfil contracts, to repair damage done by us, and such like duties, are perfect. To relieve the indigent, give alms, shew



those who are gone out of their way the right road, give counsel to those who are in doubt, and such like duties, are imperfect. See Cicero de off. 3. 12. & seq.

## Sect. CXXIII.

Into natural and christian.

Further, law being the rule of duties (§ 121), because law is either *divine* or *human*, and *divine* law is either *natural* or *positive*, there are so many corresponding divisions of duties. Those which are commanded by the *divine natural* law, are called *natural duties*. Those commanded by the *divine positive* law, are called *christian duties*; and those, in fine, which are enjoined by *human laws*, are called *civil offices* or *duties* \*.

\* To worship God with religious reverence, to honour our parents, to defend ourselves against injuries, are *natural duties*, 1. 2. 1. 3. Dig. de just. & jure: To deny ourselves, take up our cross, and follow Christ, are *christian duties*: to pay civil taxes, to observe particular forms and times in law-suits, and such like, are *civil duties*.

## Sect. CXXIV.

Into duties to God, to ourselves, and to others.

But the principal division of duties is taken from their object. For as there are three objects to whom we owe certain duties, God, *ourselves*, and *other men* (§ 90), so there are duties of three kinds; *duties to God*, *duties to ourselves*, and *duties to other men*; of all which we are to treat in order.

## Sect. CXXV.

The foundation of our duties towards God.

As to our *duties towards God* we have already observed, that they must be inferred from the consideration of the *divine perfections* (§ 87); and hence we concluded, that God ought to be loved with a love of *devotion and obedience*, and therefore ought to be worshipped with all the powers of our soul, as the most perfect of Beings, upon whom we wholly depend, and to be obeyed with the most sincere and perfect obedience (§ 91).

Sect.

## Sect. CXXVI.

Since the duties we owe to *God* must be deduced from his infinite perfections (§ 125), it follows, by necessary consequence, that man is obliged not only to acquire the most lively knowledge of *God*, and of his perfections, but daily to encrease this knowledge, and advance in it, that he may attain daily to greater and greater certainty and perfection in it; which, since it cannot be done but by daily meditation upon those truths which reason is able to discover concerning *God*, by the careful and serious contemplation of his works of creation and providence, so full of evident marks of his infinite wisdom and goodness; hence it is manifest that we are obliged to these exercises, and that those who neglect these means of coming to the knowledge of *God*, which are in every one's power who has a sound mind, are in a state of inexcusable ignorance; and those who ascribe any imperfection to *God*, are in a state of inexcusable error (§ 107) \*.

Our obligation to know *God*.

\* Hence the apostle says what may be known of *God* is manifest to the Heathens, because the invisible perfections of *God* from the beginning of the world are clearly discovered by his wonderful works, and therefore they are without excuse who know him not, Rom. i. 20. And whence else indeed that universal consent in the acknowledgment of his being and perfections urged by Cicero, Qu. Tusc. 1. 13. de nat. deorum, 2. 2. Maxim. Tyr. diss. 38. Ælian. Var. hist. 2. 31. Sen. ep. 117? For tho' this universal consent be not a demonstrative argument of the Being of *God* (§ 71), yet hence it is manifest, that as the apostle says, "What may be known of *God* is easily discoverable." For which reason, Cicero de nat. deorum, 2. 2. affirms, "If any one doubt whether there is a *God*, I cannot comprehend why the same person may not as well doubt whether there be a sun or not."

## Sect. CXXVII.

And to  
have just  
apprehen-  
sions of  
his per-  
fections.

Hence it likewise follows, that we are obliged, or that it is our duty to have just apprehensions of the divine perfections, and to know and believe that he is the Creator and Governor of all things, that all things are made by him, and are under his providence and government, human affairs principally; and that he is one *pure, eternal, independent, omnipotent, incomprehensible, intelligent, wise, omniscient, free, active, good, true, just, and most excellent Being* \*.

\* Epictetus Enchirid. c. 38. tells us, "The chief thing in religion is to have just ideas of the immortal powers, and of their infinitely wise and good administration." And they are in a great error indeed, who think that the whole of our duty consists in probity and integrity, of life, and that it is a matter of indifference what one thinks of God, or what notions he entertains of divine things. For since our duties to God can only be inferred from his perfections (§ 125), how can one render to God the homage and reverence due to him, or that sincere and universal obedience to which he is justly entitled, if he be ignorant of his perfections, or has imbibed false and corrupt notions of them?

## Sect. CXXVIII.

All impiety and  
blasphemy are in-  
excusable.

He who obstinately denies the being, or any of the perfections of God, is *impious*: he who ascribes imperfections to God, repugnant to his nature, is called a *blasphemer*: since therefore they, who do not know the perfections of God, are inexcusably ignorant, and they, who attribute any imperfection to him, inexcusably err; it is incontrovertible that all *blaspheming* and *impiety* are inexcusable. But they are therefore *impious*, and without excuse, who, with a hardened mind, deny the divine existence or providence; and they are *blasphemers*, who, with *Homer*, and other poets, assert a plurality

lity of Gods, and represent them as contending and quarrelling one with another; as adulterers, incestuous, or deformed, lame, in pain, and groaning in an effeminate manner; and who have not only professed in words such absurd opinions of the Gods, but have not hesitated to set them forth to the eyes of men under horrible images, and by wicked and vile ceremonies\*.

\* The ancient writers of apologies for the christian religion have severely reproached the Pagans for this impiety and blasphemy, as Justin Martyr, Athenagoras, Theophilus Antiochenus, Tatianus, Hermias, Tertullian, Cyprian, Minucius Fælix, Arnobius, Lactantius, Eusebius, Julius Firmicus Maternus, and others. But which is more surprizing, some Pagan authors have likewise reprov'd this madness of their cotemporary countrymen. Not to quote several passages of Lucian and other Heathen writers to this effect, I shall satisfy my self with mentioning one of Sophocles preserved to us by Justin Martyr *Parænes. ad Græc.* p. 17. and *de monarchia Dei*, p. 104, and by Eusebius, *Præp. Evang.* p. 348, and some others. "In truth, there is one God who made heaven and the spacious earth, the ebbing and flowing sea, and the mighty winds. But many of us having lost our understanding, for a consolation in our calamities, make to ourselves Gods, and endeavour to propitiate lifeless images by sacrifices to them: we celebrate festivals foolishly, imagining ourselves pious in so doing." Is it not truly wonderful to find Sophocles reproaching his fellow Pagans for the same impiety the apostle charges them with, *Rom. i. 21, 22, 23.*

Sect. CXXIX.

He who has a just and lively notion of any perfections, cannot but be highly delighted with the contemplation of them, and will spare no pains to persuade others to pay the same regard to the Being possessed of them; it is therefore our duty to endeavour to bring others to the knowledge of the divine perfections, and to restore those who err to a right apprehension of them; and, as much as in us lies, to convince the impious, by solid and persuasive

Our obligation to promote the glory of God.



suasive reasoning with them, of their absurdity and wickedness, and bring them to render due reverence to God: and they who do so, are said to exert themselves *to promote the glory of God*.

\* I have said by solid and persuaſive arguments, not menaces and penalties. For ſince ignorance and error are vices not of the will, but of the underſtanding, there is no other remedy for them, but to convince perſons of the truth, and to excite them by proper arguments to embrace it: and hence it is evident, that thoſe can never be ſerviceable to the ignorant or erring, who are for employing fire and gibbets againſt atheiſts, eſpecially ſince it hath never been an uncommon practice to brand with that name (to uſe the words of Clemens Alex. in Protept.) “men living regularly and modeſtly, who were quicker-ſighted in diſcerning impoſtures about the Gods than the generality of mankind.” Of this many examples are brought by the learned. See *Ælian. Var. Hiſt. 2. 31.*

#### Sect. CXXX.

And to  
the love  
of God.

Be cauſe he who has a juſt conception of the divine perfections, cannot but highly delight in them (§ 129), and the deſire of good to an object, with delight ariſing from the conſideration of its perfection and happineſs, is *love* (§ 8), the conſequence is, that God muſt be loved. And be cauſe of the more excellent and ſublime a nature a Being is, the more love and veneration is due to it (§ 87): God ought to be loved with the moſt perfect love; *i. e.* as the ſcripture expreſſes it, “with all our heart, with all our ſoul, and with all our ſtrength,” Mat. xxii. 37. Luke x. 27. Be cauſe goodneſs is one of the divine perfections (§ 127); God is in himſelf, and with regard to mankind, infinitely good: he is therefore to be loved for both theſe reaſons \*.

\* What the Epicurean philoſophers and the Sadduceans in ancient times ſaid of the pure love of God, is well known to the learned: And in our own times, ſome myſtick divines have renewed that doctrine, the chief of whom is Franc. Saignac de Fenelon, Archbiſhop of Cambray,

bray, whose treatise entitled, "The maxims of the saints," gave rise to a controversy, of which I have elsewhere given a short history (Elem. Philos. moral. § 198). But who can conceive God otherwise than as good to all his creatures? How idle then is the question about the pure love of God? nay, how dangerous? This hath been shewn by Leibnitz, in Pref. prodrom. & mantissæ codicis juris gentium, by Wolfius and others.

## Sect CXXXI.

Among the divine perfections are omnipotence and omniscience (§ 127); but none can keep these perfections in view without being excited to the diligent, unintermitted study of doing whatever may be pleasing to God, and of avoiding whatever may be disagreeable to him; which study and endeavour we call *obedience* to God. And since none can represent God to himself as a most just Being, without being seriously concerned not to offend him; not to do or say any thing that is dishonourable to him, or tends to create his displeasure; it must be our duty to *fear* him: for this concern not to incur his anger is *fear*, and when united with the love of him above described (§ 130), it is properly called *filial fear* \*.

\* *Filial fear*, is therefore attended with love, and *servile fear* with hatred: it excludes love. But since it is our duty not only to fear God, but likewise to love him (§ 130), the consequence is, that the law of nature requires *filial* not *servile fear* of God, the latter of which wicked men and evil spirits cannot shake off.

## Sect. CXXXII.

He who fears God with a servile fear, separates the love of God from the fear of him (§ 131); but because love of God consists in delight in the consideration of the divine perfections (§ 130); he therefore who fears God without any knowledge of his perfections, is called *superstitious*; and hence it follows, that a good man ought carefully to avoid all

all superstition, because it proceeds from ignorant fervile fear \*.

\* *Superstition* is fear of God, which results not from the contemplation of the divine perfections, but from false conceptions of God. This is Theophrastus's meaning, Charact. p. 47, where he defines superstition, "Δεΐλιαν πρὸς τὸ δαιμόνιον, a trembling dread of the Divinity." By Δεΐλιαν, Casaubon in his notes understands fear different from that which becomes good men who have just ideas of the Deity; and by τὸ δαιμόνιον, the Gods and Demons, and whatever in times of ancient ignorance was thought to have any share of Divinity. This absurd dread, as it is in the mind, is called *internal superstition*, and as it discovers itself in outward acts, it is called *superstitious worship*.

### Sect. CXXXIII.

Its effects. All superstition, internal and external, being inconsistent with just apprehensions of the divine perfections (§ 132), one who has just notions of them, will keep himself carefully from all slavish fear of created beings, and from those absurd errors, whereby God is represented as avaritious and placable by gifts; and likewise from magical arts and divinations, from idol-worship; and, in fine, from this absurd opinion, that God may be propitiated by mere external worship,, tho' not accompanied either with internal fear or love.

\* These are the principal branches of *superstition*, to which all its other effects may be reduced. See Budd. de Super. & Atheismo, cap. 7 & 8. Hence it appears how idle the comparison between *superstition* and *atheism* is, both being equally repugnant to true piety, as the same learned writer has proved against Bayle, cap. 4. § 5. None however will deny, that very many great evils proceed from *superstition*, insomuch that there is reason to cry out with the Poet,

*Quantum religio possit suasse malorum.*

If by *religio* be meant the *dread of God*, disjoined from *love*, i. e. *superstition*. Upon this subject Juvenal's fifteenth satyr is well worth our reading. For it often happens, that as the Poet there says,

*Inter*

*Inter finitimos vetus atque antiqua simulas,  
Immortale odium, & nunquam sanabile vulnus.  
Ardet adhuc Ombos & Tentyra. Summus utrimque  
Indo furor vulgo, quod numina vicinorum  
Odit uterque locus, quum solos credat habendos  
Esse Deos, quos ipse colit.*

Sect. CXXXIV.

Further, since none can represent the divine per-  
fections to himself without presenting to his mind  
the ideas of perfect wisdom, power and goodness;  
such a person cannot but place his confidence and  
trust in God, and be satisfied in his mind with  
the divine administration; and thus be disposed to  
submit to whatever may happen to him in the  
course of divine providence with a firm and cheer-  
ful soul; nor will he be stumbled because evils fall  
upon the good, and good things fall to the share  
of the wicked, but be persuaded that all things shall  
co-operate to the good of the virtuous, to good  
in the whole.

And to  
repose our  
trust in  
God.

Sect. CXXXV.

In these and the like offices does that *internal*  
*worship* of God consist, by which we understand the  
love, fear and trust, with which we embrace God  
in our pure minds. But man being so framed, that  
his affections naturally exert themselves in certain  
external actions, his internal love of God could not  
be thought sincere unless it exerted itself in *exter-  
nal love*; i. e. in such external acts as express love,  
fear, and resignation towards God\*.

Of inter-  
nal and  
external  
worship.

\* Some have denied that the necessity of external worship  
can be proved from principles of reason, partly, be-  
cause God does not stand in need of it; (as the philoso-  
pher Demonax in Lucian, in Demonacte, tom. i. p. 861,  
asserts, when being accused of impiety, for not offering  
sacrifice to Minerva, he answered, "I did not think she  
stood in need of sacrifice.") Partly because human society,  
and the tranquillity of human life, is not hurt by the omis-  
sion of external worship: (See Thomasius, Jurisprud.  
divin,



divin. 2. 1. 11. and his introd. in Ethic. 3. 37. & seq.) But neither does God stand in need of internal worship, which none will deny to be a duty. And the other argument falls to the ground, when that fundamental error is refuted, which asserts that nothing is of the law of nature but what can be inferred from sociability (§ 75.) See Hochstet. Colleg. Pufend. Exercit. 3. 38.

## Sect. CXXXVI.

External  
worship  
ought to  
flow from  
the love  
of God.

Since therefore the external worship of God consists in actions flowing from love, fear, and resignation towards God (§ 135), but love must naturally exert itself in praising the Being in whose perfection and happiness we highly delight, it must be our duty always to speak honourably of God, and with due reverence, and to excite others by our actions to love him, to sing praises to him, and not to dishonour his name by rash swearing, by perjury, or by whatever irreverent discourse.

## Sect. CXXXVII.

As also  
from the  
fear of  
God.

From the fear and obedience we owe to God as the most perfect of Beings, we may justly conclude that all our actions ought to be conformed to his precepts, and that we ought always to have in mind his omnipresence and omniscience, by which he discerns our most secret thoughts; whence it follows, that all hypocrisy and dissimulation ought to be avoided, as being necessarily accompanied with injurious and contemptible apprehensions of God.

\* Thales Milesius, acknowledged this sublime truth, when being asked, "whether God saw unjust actions," he answered, "yea and unjust thoughts likewise," Clemens Alexand. Strom. 5. p. 594. But who can choose but fear an omnipotent God, who knoweth and seeth all things? Epictetus says elegantly in Arrian, "Wherefore, doors and windows being shut, or when you are in darkness, say not you are alone; for you are not. And you certainly are not, because God is present." We are therefore under the strongest obligation to sincere piety, since we are always in the sight of God.

Sect.

## Sect. CXXXVIII.

In fine, he who places his trust in God (§ 134), <sup>Confidence</sup> will never cease to send up pure devout prayers to him, and will cheerfully embrace every occasion of <sup>ought to be placed</sup> speaking well of and with God privately and publicly. For this is what right reason prescribes concerning the external worship of God. As for the external rites, it is likewise obvious, that public worship cannot be performed unless certain times and places be devoted to it; and a duty of such importance ought to be done with all decency; but as to the rites or ceremonies themselves, reason can lay down no other rule about them, but in general, that they ought to be in every respect such as are proper to recal to our minds those sentiments in which divine worship consists.

## REMARKS on this Chapter.

I have but little to add to what our Author hath said of Religion. Our Harrington justly lays down the following truths relative to religion as aphorisms. "Nature is of God: some part in every religion is natural; an universal effect demonstrates an universal cause; an universal cause is not so much natural, as it is nature itself; but every man has either to his terror or his consolation, some sense of religion: man may therefore be rather defined a religious than a rational creature; in regard that other creatures have something of reason, but there is nothing of religion." So we frequently find ancient philosophers reasoning about human nature and religion, as I have shewn from several authorities in the 7th chapter of my *Principles of Moral Philosophy*, the whole of which treatise is designed to be a demonstration *à posteriori*, i. e. from the wisdom and goodness of providence, that the whole world is made and governed by an infinitely perfect mind, in the contemplation, adoration and imitation of whom the chief happiness of man consists, according to his make and frame. The arguments, *à priori*, for the proof of a God, are shewn in the conclusion of that essay not to be so abstruse as is said by some; and they are more fully explained in my *Christian Philosophy*. The end, the happiness, the duty of a Being (all which ways of speaking must mean the same thing) can only be inferred from its frame and constitution, its make and situation. But nothing can be more evident than, "That man is made to love order, to delight in the idea of its universal prevalence throughout nature, and to have joy and satisfaction from the con-

consciousness of order within his own breast, and in the conduct of his actions." All the joys of which man is susceptible, which never nauseate or cloy, but are equally remote from grossness and disgust, or remorse, may be reduced to the love of order and harmony: nothing else can give him any pleasure in contemplation or in practice, but good order; the belief of good administration in the government of the world; the regular exercises of those generous affections which tend to public good; the consciousness of inward harmony; and the prevalence of good order and publick happiness in society, through regular and good government: to these classes are the principal pleasures for which man is framed by nature, reducible, as might be shewn, even from an analysis of the pleasures belonging to refined imagination or good taste in the polite arts: but whence such a constitution? Does it not necessarily lead us to acknowledge an infinitely perfect author of all things; an universal mind, the former and governor of the universe, which is itself perfect order and harmony, perfect goodness, perfect virtue? Whence could we have such a make? whence could we have understanding, reason, the capacity of forming ideas of general order and good, and of delighting so highly in it, but from such a Being? Thus the ancients reasoned. Thus the sacred writers often reason. And this argument is obvious to every understanding. It is natural to the mind of man. It is no sooner presented to it than it cleaves to it, takes hold of it with supreme satisfaction, and triumphs in it. And what part of nature does not lead us naturally to this conception, if we ever exercise our understanding, or if we do not wilfully shut our eyes? But having fully enlarged upon this and several other arguments for the Being of a God in my *Principles of Moral Philosophy*; I shall here only remark,

1. That Polybius, Cicero, and almost all the ancients, have acknowledged that a public sense of religion is necessary to the well-being and support of society: society can hardly subsist without it: or at least, it is the most powerful mean for restraining from vice, and promoting and upholding those virtues by which society subsists, and without which every thing that is great and comely in society, must soon perish and go to ruin.
2. That with regard to private persons, he who does not often employ his mind in reviewing the perfections of the Deity, and in consoling and strengthening his mind by the comfortable and mind-greatning reflexions to which meditation upon the universal providence of an all-perfect mind, naturally, and as it were necessarily lead, deprives himself of the greatest joy, the noblest exercise and entertainment the human mind is capable of; and whatever obligations there may be to virtue independent of, or abstract from such a persuasion, he cannot make such progress in virtue, he cannot be so firm, steady and unshaken in his adherence to it, as he who being persuaded of the truth just mentioned, is daily drawing virtuous strength and comfort from it. This is fully proved by an excellent writer on morals, who, notwithstanding,



withstanding hath been often most injuriously reproached for aiming at a scheme of virtue without religion. This author hath fully proved that the perfection and height of virtue must be owing to the belief of a God; since, where the latter is wanting, there can neither be the same benignity, firmness or constancy; the same good composure of the affections, or uniformity of mind, Characteristics, T. 2. p. 56, &c. 3. I would remark, that the being and providence of an universal, all-perfect mind, being once established, it plainly follows from hence, by necessary consequence, that all the duties of rational creatures may be reduced to this one, with several antient moralists, *viz.* "to act as becomes an intelligent active part of a good whole, and conformably to the temper and character of the all-governing mind." This is acting agreeably to nature; to the nature of an intelligent creature endued with active powers, a sense of public good and order; agreeably to the nature of the Supreme Governor of all things, and to the order of his creation and government. All our duties may be reduced to, or comprehended under that one general article of acting as becomes an intelligent part of a good whole: for to do so, we must delight in the author of the world, and resign to his will cheerfully the management of all things independent of our will; and by our will cheerfully co-operate with him in the pursuit of publick good, as far as we are active and have power, or as things are made by him dependent upon our will and conduct. He who is incapable of receiving pleasure from the belief of a God, and the contemplation of general order and harmony, must be a very imperfect creature: for he wants the noblest of senses or faculties. And he who can delight in the contrary persuasion, *i. e.* in the idea of a fatherless world and blind chance, or, which is yet more horrible, malignant administration, must have a very perverted mind, if perversion has any meaning: he must be as properly a monster, in respect of a moral frame, as any deformity is monstrous in regard to bodily texture.

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## CHAP. VI.

### *Of the duties of man to himself.*

#### SECT. CXXXIX.

Nothing is nearer to man, besides the ever-blessed God, than he is to himself; nature having inlaid into his frame such a sensibility to his interests, and so tender a love of himself, that we justly look upon him to be out of his senses and distracted, who

Man is obliged to love himself.

Hates



hates and wishes ill to himself. Nor is this *self-love* unjust, while it does not disturb good order. For it is that love with which one delights in his own perfections and happiness, and is concerned to procure and augment these goods. But since God hath created us, and adorned us with many excellent perfections, and given us the means of improving in perfection and happiness, he must be concluded to will that we should endeavour to promote our happiness and perfection, and be delighted with it; *i. e.* that we should love our selves (§ 92).

## Sect. CXL.

What this  
love is.

From which we have already inferred (§ 92), that man is bound to pursue, promote, and preserve his own perfection and happiness, as far as is consistent with the love of the supreme Being \*.

\* Therefore, we do not perform these duties to ourselves that we may be happy (for we have shewn above, that this tenet is false, that utility is the only source or rule of just and unjust) but because God wills that we study to promote our happiness and perfection: and therefore to promote our perfection and happiness is itself our duty; and is not the cause which impels or obliges us to it.

## Sect. CXLI.

What are  
its objects.

Since man is obliged, by the will of God, to all and every thing which tends to promote, preserve, and enlarge his happiness and perfection (§ 140); and man consists, not only of mind, but of body likewise, in such a manner, that he is a compound of *body* and *mind*; the consequence is, that man is obliged to promote the perfection of both his constituent parts; and because the faculties of the mind are two, *understanding* and *will*, he is obliged to study the perfection of both; wherefore the duties of man, with respect to himself, are relative partly to the *whole man*, partly to the *understanding*, partly to the *will*, and partly to his *body* and *external state* \*.

\* It

\* It is proper to observe this, in opposition to the doctrine of Socrates and others, who maintained that the body is not a part of man, but his instrument only, and that external things do not properly appertain to man, or in the least concern him. So Simplicius, in his preface to his commentary on Epictetus, "If a man commands his body, and the body doth not so much as command itself, then man is not body, and for the same reason, he is not both mind and body, but wholly mind." Whence he a little after reasons thus: "He who bestows his care upon the body, bestows it upon things which belong not to man, but his instrument: But he, whose study and cares are set upon riches, and such like external things, bestows his care neither upon man, nor his instrument, but upon things subservient to that instrument." Many other such foolish boasts we find in some ancient writers, which are equally false and hurtful.

## Sect. CXLII.

Whence we conclude, that these duties ought not to be severed from one another; and therefore, that neither the mind nor the body ought totally to be neglected: but if it should happen that the duties due to both cannot be performed, we ought, of many perfections and goods, which cannot be obtained at one and the same time, to choose the most excellent and necessary (§ 94). And therefore the mind being more excellent than the body, we ought to be more diligent about the perfecting of our minds than our bodies, yet so as not to neglect the latter\*.

These duties ought not to be severed.

\* They therefore act contrary to their duty, who are so taken up about the body that they suffer their mind, as it were, to brutalize. But, on the other hand, they do not fulfil the whole of their duty, who impair their bodies by their too sedulous uninterrupted application to the culture of their minds in knowledge and wisdom. Neither of these duties is to be neglected.

## Sect. CXLIII.

Man is obliged to preserve his life and eschew death.

As for what relates to the *whole man*, as consisting of soul and body, his felicity and perfection as such, consists in this, that the union of his mind and body be safe, because these parts being separated, tho' the mind, being immortal, survive, yet the man no longer subsists. Man therefore is obliged to take care to preserve his life, and to avoid the dissolution of the union between his body and mind, which is death, unless the mind be persuaded of a greater good to be obtained by death: in which case one ought not indeed voluntarily to choose death, but to suffer the menaces of it and itself with a brave and intrepid magnanimity \*.

\* There is reason therefore to pronounce Hegesias *πρῶτος ἀναλῶς*, to have been mad, who thought man obliged to put an end to his life, and went about urging men to destroy themselves, by so many arguments that his hearers threw themselves in great numbers into the sea. Cic. Tusc. I. 34. Valer. Max. 8. 9. For if it be true, that one must be distracted and out of his senses to hate himself (§ 139), we must say of Hegesias's doctrine and conduct with a poet on another occasion,

*Non sani esse hominis, non sanus juret Orestes;*  
especially, since he reduced all human obligations to pleasure, and admitted not of a future existence, from which any consolation could be drawn to make death more desirable than an afflicted life. On the other hand, the apostle's desire was not contrary to his duty, when he *longed to be dissolved*: nor are the martyrs to be blamed, who, supported by the hopes of immortal glory after death, feared no tortures; because an evil which delivers us from a greater one, and procures us a very great good, is rather to be accounted good than ill.

## Sect. CXLIV.

And therefore self-murder is unlawful.

Hence moreover we infer, that he acts contrary to his duty who lays violent hands on himself. And this may be proved from other considerations, as, that this action is repugnant to the nature of love,

love, and to a right disposition of mind, and therefore involves an absurdity or contradiction in it; that it is inconsistent with that trust and resignation which are due to God, and that acquiescence in the divine will, which we have already shewn to be commanded by the law of nature (§ 134). But it will be sufficient to add this one argument. Man is obliged to love man as himself; and therefore himself as others (§ 93). But the love of justice does not permit us to kill a man, therefore self-love does not permit us to destroy ourselves\*.

\* Thus we ought to reason with those who are capable of reasoning; as for those who are furious and out of themselves, the fatal action is not to be imputed to them (§ 106). Nothing can excuse self-murder but madness: not a guilty conscience, since there are means of quieting it, *viz.* by reformation: nor the greatest distress and pain; for tho' it be true, that of two evils the least ought to be chosen; yet voluntary self-murder is not a physical but a moral evil, which cannot be chosen; and no calamity or pain is so great, but it may be alleviated by resignation to the divine will: let me add, that it is not the least species of madness to die for fear of dying. See Wolf. Philosoph. Moral. § 340 & seq.

Sect. CXLV.

From the same principles laid down (§ 143), it is evident that they act no less contrary to their duty who hasten their death by immoderate labour, or by luxury and lasciviousness, or who do not take proper care of their health; and who, when neither duty calls, nor necessity urges, voluntarily expose themselves to danger, and bring themselves into peril or pain by their own fault.

\* For whoever is the author or cause of an action, to him that action is justly imputable (§ 105). But who will call it into question, that he is the cause of his death who destroys and tortures himself by excessive toil? he who wears out and wastes the strength of his body by riotous living? He who takes no care of his health, but exposes



himself unnecessarily to manifest dangers? Since therefore, even in *foro humano*, by the *Lex Cornelia*, not only he is guilty of murder, who with premeditated evil intention directly kills a man, but even he who was the cause of his death; (l. 16. § 8. Dig. de pœnis, l. 1. D. ad L. Cornelianam de Sicar.) who can doubt but he must be guilty of self-murder in *foro divino*, who was the cause of his own death?

## Sect. CXLVI.

The duties  
of man  
with re-  
gard to  
his under-  
standing.

The perfection of human *understanding* certainly consists in the knowledge of truth and good; to acquire, enlarge, and preserve which man being obliged (§ 140), the consequence is, that every one is bound to exert himself to strengthen and cultivate his understanding, or to improve his faculty of discerning truth from falshood, and good from evil; and to let no opportunity pass neglected, whether of instruction from others, from books, or from experience, of learning useful truths, and wholesome precepts and maxims concerning good and evil \*, that thus he may attain to all the useful knowledge within his reach; and if he be in that condition of life that does not allow him to learn all that it is useful to know, he may at least be master of what it is most necessary and advantageous for him to understand, and have that at his command as ready coin, so to speak.

\* This knowledge is equally necessary to all men, partly because the will cannot pursue but what the understanding represents to it as good, nor decline but what the understanding hath discerned to be evil (§ 30); and partly because even actions done through ignorance are imputed, so far as the law might, and ought to have been understood (§ 108.) Sophocles therefore says with good reason in his *Antig.* v. 1321. "To have wisdom is the principal thing with regard to happiness."

## Sect. CXLVII.

Of the  
particular  
culture to

From which last proposition (§ 146), it follows, that whereas all persons are equally obliged to the duties

duties hitherto mentioned; every one is for him-<sup>which</sup>self in particular obliged to that special culture of <sup>particu-</sup>his understanding, which is suitable to his particu-<sup>lars are</sup>lar talents and genius, and to his rank and condi-<sup>obliged.</sup>tion in life; and therefore every one ought to know his force and genius, and one is hardly excusable if he chooses a way of life to himself for which he is not qualified, or if he forces any in <sup>his</sup>power\*, under his authority, or committed to his direction, fo to do.

\* The culture therefore of our understanding, to which we are obliged, is either general, to which all men are equally bound, of which § 146; or special, of which in this section. The foundation of this distinction is, that all men have reason in common; but every particular person has his particular cast and genius, his particular talents; understanding, memory and judgment not being common to all in the same degree. All men are therefore obliged to cultivate their reason, but all men are not equally well qualified for the same way of life, the same profession and business. Whence we may, moreover, conclude, that an *internal special call* (if we set aside divine inspiration) is nothing else but the will of God concerning the particular kind of life one ought to choose, manifested to one by the gifts and talents with which he is endued, of which Perseus speaks, Sat. 3. v. 71.

*Quem te Deus esse*

*fussit, & humana qua parte locatus es in re,*  
*Disce.* —————

Sect. CXLVIII.

The perfection of the *will* consists in the desire <sup>Duties re-</sup>and fruition of good. But since we cannot pursue <sup>lative to</sup>good, unless we have first conceived a just notion <sup>the will,</sup>of its excellence, nor avoid evil, unless we know it to be such (§ 30); hence it is manifest, that we ought not to acquiesce in any knowledge of good and evil whatsoever, but exert ourselves with all our power to have a true and lively conception of them; that not every good is to be chosen, but of

many goods that which is best and most necessary; yea, that evil ought not to be avoided, if it be necessary to our attaining to a greater good; and finally, that our chief good ought to be desired and pursued above all things; and that we ought to bear the want of other goods with a patient and satisfied mind, if we cannot attain it without being deprived of them \*.

\* They are therefore mistaken, as we have already observed, who place our chief happiness, which we ought to pursue in this life, in the enjoyment of all goods; as Plato in Cicero, Qu. Acad. l. 6. For because such enjoyment is above human power, and the condition of this life, the consequence is, that we should apply our endeavours to attain to our best and greatest good, what our Saviour elegantly calls, “ τὴν ἀγαθὴν μερίδα, the good part.” Luke x. 42.

## Sect. CXLIX.

The amendment of the will is chiefly necessary.

Further, since he who is obliged to the end, is likewise obliged to the means, it follows, that none of these means ought to be neglected which right reason shews to be necessary or proper for attaining to our greatest happiness; but that we ought to apply ourselves with uninterrupted care daily to amend and perfect our minds, to obtain the right government of our affections, and to rescue ourselves from every vitious appetite and passion \*.

\* For these often so mislead a man, that he falls short of his end; is deprived of true happiness, and makes a sad shipwreck of it. Besides, in general none can perform his duty aright who is not master of his passions and appetites, because these so distort and pervert the judgment, that nothing can be done in order, or according to the right rule. Hence that excellent advice of the poet,

*Ne frænos animo permitte calenti :*

*Da spacium, tenuemque moram, male cuncta ministrat Impetus.*

Pap. Stat. Theb. l. 10. 626.

The case is this: “ Reason, to which the reins are committed, is strong, while it is undisturbed by the affections: but

but if these mix with it they darken and pollute it ; it cannot govern or keep within due bounds what it cannot restrain or withdraw : the mind, when it is shaken and agitated by any passion, is a slave to it, and driven by it at its pleasure." Seneca de Ira, v. 7.

Sect. CL.

It now remains to speak of our *body*, the perfection of which consists in the fitness of all its parts to perform their necessary functions ; and it is plain that we are obliged to take care of our health, and therefore to direct our eating and drinking, labour, exercise, and every thing to that end ; to the preservation of our health, and the increase of our strength and agility \* ; and, on the other hand, to avoid, as much as lies in our power, whatever tends to maim, hurt, or destroy our bodies, or any of its members, in any degree.

Our obligation to preserve and perfect our body.

\* But in this every one ought to have regard to his rank and station in life. For one degree and kind of vigour, agility and dexterity is requisite in one station, and another in another ; one, *e. g.* to a wrestler, another to an artist, another to a soldier, and another to a man of letters. Whence it follows, that the same kind of exercise is not proper to every person ; and therefore that prudence ought to have its end before its eyes, and to choose means suited to it. Regard ought also to be had to different ages of life. " An old man, if he be wise, does not desire the strength of a young man, no more than a young man does that of a bull or elephant," says Cicero, Cato major. c. 9. And for this reason, one kind of exercise is proper to old men, and another to young. " As we ought to fight against diseases, says he, so ought we likewise against old age. We ought to take care of our health, to use moderate exercise, and to eat and drink so as to refresh, not oppress our bodies."

Sect. CLI.

But all this is enjoined in vain, if one be so distressed by poverty, that he has it not in his power either to live in a wholesome manner, nor to regulate

How far one is obliged to seek riches.



late his labour as his health requires; and therefore it is obvious, that a person must have a right to seek after the things that are necessary to subsistence and decent living. When the provision of these things is abundant, it is called *wealth* or *riches*; and every one is obliged to acquire as large a share of them as he can by just means, and to preserve and use prudently what he hath justly acquired \*.

\* We do not by saying so approve of *avarice*, the basest and most pernicious of vices. For an avaricious person desires riches for riches sake; but a person who is wisely selfish, only desires them for the sake of living decently. To the former, no gain, nor no means of increasing wealth appear base and fordid; nay, so much as unjust; but this is the constant language of his heart,

*O cives, cives, quærenda pecunia primum:*

*Virtus post nummos.*

The other does not scrape riches, but takes hold of every allowable opportunity of gaining them. In fine, whereas the miser is insatiable, and yet does not enjoy his possessions, the other manages his affairs quite otherwise; and this is the genuine language of his soul,

*Haud paravero,*

*Quod aut avarus ut Chremes terra premam,*

*Discinctus aut perdam ut nepos.*

He manages his estate with prudent oeconomy, that he may not be forced to live at the expence of others, or shamefully to sponge them; that he may not be a burden or a shame to his friends; that he may not be continually harassed by dunning creditors or squeezing usurers; that he may have wherewithal to relieve the indigent, and assist his friends, and that his children may have no cause to reproach him after his death for their distress. And who will deny that these duties are incumbent upon every good man?

#### Sect. CLII.

And  
therefore  
to indu-  
stry.

But because the end cannot be acquired without the means, and there is no other mean of acquiring what is necessary to supply our necessities but labour and industry, it is manifest that every one is bound to go through with the labours of the business in

in life he hath chosen with a cheerful mind, and to give all diligence to get a comfortable subsistence; and therefore he acts contrary to duty who lives in idleness, and thus brings poverty and misery upon himself; for such distress is ignominious; whereas poverty is not criminal or shameful, when one, who does all in his power, is overwhelmed by some private or public calamity; or when one, without his own fault, can find no occasion of doing for himself.

\* Both therefore belong to the duty of a good man, not to let any occasion slip of bettering his fortune without profiting by it, and to bear honest poverty with an equal mind. Job did both. And Horace joins both these duties together, who thus complains, in his elegant way, of the instability of fortune:

*Laudo manentem. Si celeres quatit  
Pennas: resigno, quæ dedit, & mea  
Virtute me involvo, probamque  
Pauperiem sine dote quæro.*

Carm. l. 3. 29. v. 53.

Sect. CLIII.

Since a person ought not to neglect any of those things which are necessary to increase or preserve his happiness (§ 140); and none can doubt but a *good name*, which consists in the favourable opinion of others with regard to our virtue and accomplishments, is necessary to preserve and increase our happiness. [For one, of whose virtue and accomplishments all think well, all think worthy of happiness, and all are therefore solicitous to promote his happiness.] For these reasons, every one is obliged to take care of his *reputation*, as a mean of his happiness; and therefore to act in every affair, private or public, as reason directs, and not only to preserve his good name by worthy actions, but, as much as lies in his power, to increase it.

\* But

\* But if this be the interest and duty, even of those who have never diminished or sullied their reputation by any base action, how much more are those, whose youth is not free from blemishes, obliged to endeavour to wipe them off, and procure a good reputation by virtuous deeds? Themistocles is an example to us of this, of whom Cornelius Nepos, c. 1. says, "This reproach did not break but erect his spirit. For perceiving it could not be overcome but by the greatest virtue, he devoted himself wholly and zealously to the service of the public and of his friends, by which means he soon became illustrious." Sueton observes of Titus, "That he was recovered from the vices into which his mind had strayed in his youth, by shame and the fear of ignominy," Tit. c. 7. Other Examples are to be found in Valerius Maximus, c. 9. and Macrobius, Saturn. 2. 9.

## Sect. CLIV.

And to  
refute as-  
persions.

But if it be one's duty to take care to preserve his good name unblemished (§ 153); since *calumnies*, i. e. *false reports*, may blacken it; the consequence is, that we ought to omit nothing that is necessary to wipe off aspersions cast injuriously upon us, unless they be so groundless and malicious, or the author of them so contemptible, that it is better to overlook them with generous contempt\*.

\* Those are called *manifest calumnies*, which it is not worth while to give one's self the trouble of confuting. These no more disturb a good man than the barking of little dogs. And he who shamefully spits out such against one, does not hurt another's reputation, but wholly destroys his own. So Simplicius upon Epicetetus, c. 64. teaches us: "As, if it be day, the sun is above the earth, and he who denies it does hurt only to himself, and not to the truth. So he who injures you, or throws false calumnies upon you, wrongs himself, he does not hurt you, or do you any mischief." The case is different if the calumny be *specious*, i. e. attended with some probability, which may not only deceive the unwary, but even the most prudent and cautious. For he who does not take proper methods to refute such reproaches and clear himself, must appear diffident of his cause, and therefore he falls short  
of

of the care he is obliged to, with respect to maintaining his good character and name entire and unblamed. For that ought to be as dear to one as life.

Sect. CLV.

Tho' so far the love of ourselves be most just and lawful; yet, no doubt, it becomes vitious, soon as it exceeds its due bounds, and gets the ascendant over our love to God, the most perfect of Beings (§ 92); and hence we concluded above, (§ 140), that all our duties to ourselves keep their due rank and place, if they are performed in proper subordination to the love of God, or do not encroach upon it; whence it is manifest, that the common maxim, "*That necessity has no law,*" is not universally true.

\* This aphorism is in every one's mouth, and produced on every occasion as an oracle, as if there were nothing so base and criminal but necessity would render it excusable. Euripides, in a fragment of Hippolyt. obtest. says,

*Quoties periculum est, ex mea sententia  
Necessitati debet & lex cedere.*

"In my opinion, in cases of imminent danger, even law ought to give way to necessity." And if this maxim were absolutely true, the martyrs must have sinned, who paying no regard to the indulgence necessity affords, could not be induced to offer the smallest quantity of incense to false deities, to escape the severest tortures: nor did Joseph act less foolishly, who chose rather to expose his life and liberty to the greatest danger than satisfy the lust of his mistress: Nor would any wise man blame a soldier for deserting his station, when attacked by an enemy whom he was not able to resist. And I might add more examples, but these are sufficient to shew, that this maxim about necessity cannot be absolutely true in every case.

Sect. CLVI.

But seeing this rule is not always true; and yet in some cases it ought to be admitted (§ 155); different cases must be distinguished: now, because in  
an



an action imposed upon us by sovereign necessity, no other circumstance can vary the case, but either *necessity* itself, the nature of the *law*, or the nature of the *duty* to be omitted, these circumstances ought therefore to be a little more accurately and distinctly considered, in order to be able to determine how far necessity has the power of a law, and when it has not.

## Sect. CLVII.

**Necessity** By *necessity* we understand such a situation of a  
 what it is, person, in which he cannot obey a law without in-  
 and of ccurring danger. This danger, as often as it extends  
 what to life itself, is *extreme*; and when it does not, it  
 kinds. ought to be measured by the greatness of the im-  
 pendent evil. Again, necessity is *absolute*, when  
 it cannot be avoided by any means but by violat-  
 ing a law; and it is *relative*, when another might  
 avoid it, but not the person now in the circum-  
 stances \*.

\* The martyrs were in the case of *extreme necessity*, be-  
 ing obliged to renounce Christ, or to undergo the most vio-  
 lent tortures. But it was not extreme necessity which  
 forced the Christians to apostacy, when *Julian* excluded  
 them from all opportunities of liberal education, from ci-  
 vil honours, and from military service. Daniel was in the  
 case of *absolute necessity*, when he was to be exposed to fa-  
 vage beasts, unless he gave over praying to God. The  
 necessity with which David struggled when he must have  
 perished by hunger, or have eat the shew-bread, was *rela-  
 tive*. For another who had undertaken a journey without  
 flying precipitantly, would certainly have found other  
 bread to satisfy his hunger.

## Sect. CLVIII.

**Where** Now every one may easily perceive, that not on-  
 necessity ly *extreme necessity*, but even necessity in which life  
 merits fa- is not in danger, comes here into the account. For  
 vour. because some calamities are bitterer than death, who  
 can doubt but such may strike terror into the most  
 intrepid

intrepid breast; such as being deprived of one's eyes, and other such like distresses. Besides, since of two physical evils the least is to be chosen, the consequence must be, that not only absolute necessity deserves favour, but even relative necessity, if one had no hand in bringing himself into the strait \*.

\* If one unnecessarily exposes himself to danger, he is the cause of the necessity he is brought under, and therefore the event ought to be imputed to him (§ 105). And for this reason, the necessity into which one threw himself, who having torn an edict against the Christians into pieces, was most terribly tortured, scarcely merited favour. Lactant. de mort. persecut. cap. 13. But if one should commit any thing contrary to probity and justice, even to escape death and tortures, who will deny that he does ill? Quintus, mentioned by the church of Smyrna, in a letter concerning the martyrdom of Polycarpus, is an example of this, who having voluntarily offered himself to martyrdom, and persuaded others to do the same, so soon as he saw the beasts, swore by the genius of Cæsar, and defiled himself by offering an idolatrous sacrifice: upon which occasion the Smyrneans thus express themselves, "We do not approve, say they, our brethren who unnecessarily or imprudently expose and betray themselves, since it is otherwise commanded in the gospel." And we find the like admonitions in Origen upon John xi.

# Sect. CLIX.

Law being either *divine* or *human*, and both being either *affirmative* or *negative* (§ 64); because even a sovereign cannot oblige one to suffer death without a fault, the consequence is, that all *human laws* ought regularly to be understood, with the exception of necessity. And the same is true of *divine affirmative laws*, because the omission of an action cannot be imputed to one, if the occasion for performing it was wanting (§ 114), unless the omission be of such a nature and kind, that it tends directly to reflect dishonour on God; in which

Affirma-  
tive laws,  
divine and  
human,  
admit the  
exception  
of necessity.

which case, the negative law, forbidding all such actions likewise concurs (§ 131). And to this case belongs the action of Daniel, Dan. vi. 10.

\* All this is clear. Men when they submit themselves to civil government, transfer to the magistrate all power, without which the end of government cannot be obtained. They therefore transfer to him the power of life and death, not promiscuously, because that is contrary to the end of government, but only so far as the public safety requires it. Therefore the supreme magistrate cannot oblige his subjects to suffer death without a reason, but then only when the public safety or good requires it; and therefore, his laws are regularly to be understood, with the exception of necessity. Hence Grotius says elegantly, *de jure belli & pacis*, 1. 4. 7. 2. "Laws ought to be, and commonly are made by men with a sense of human weakness."

## Sect. CLX.

But not  
divine ne-  
gative  
laws rela-  
tive to our  
duties to  
God or  
ourselves.

Divine *negative* laws bind us either to duties towards God, towards *ourselves*, or towards *other men* (§90 & 124). Those which respect our duties towards God are of such a nature, that they cannot be intermitted without dishonouring God. But we are strictly bound to avoid whatever tends to dishonour God; the consequence of which is, that no necessity can excuse the violation of the negative laws relating to our duties towards God \*. On the other hand, in a collision of two duties respecting ourselves, the safest course is to choose the least of two physical evils.

\* Hence it is plain, that there is no excuse for him, who suffers himself to be tempted by any necessity he may be under to blaspheme God, sacrifice to idols, or contaminate himself by perjury. This the Pagan writers have acknowledged. So Juvenal,

*Ambigua si quando citabere testis  
Incertaque rei, Phalaris licet imperet, ut sis  
Falsus, & admoto dicet perjuria tauro,  
Summum crede nefas, animam præferre pudori  
Et propter vitam vivendi perdere causas.* Sat. 8.

But

But tho' those who succumb under such a direful necessity are not excusable, yet the sense of human weakness obliges us to pity their lot who were shaken by such a cruel necessity, since we know that Peter found pardon for having denied Christ, after he had repented, Matt. xxvi. 75.

Sect. CLXI.

As to our duties towards other men, affirmative Divine laws, 'tis certain, admit of favour in the case of necessity; partly because an omission cannot be imputed when the occasion of performing a duty was wanting (§ 114); partly because the law of benevolence does not oblige us to delight in the happiness of others more than our own, or to love others better than ourselves (§ 94); and so far the maxim holds just, "Every one is nearest to himself."

\* Thus, *e. g.* the divine law does not oblige one to ruin himself to save another, or to give to another the small morsel of bread that remains to himself, when he is starving. That, the most holy and strict law of love inculcated by the Christian religion does not require, 2 Cor. viii. 13. Wherefore Seneca says rightly, *de benefic. 2. 15.* "I will give to the needy, but so that I may not want myself: I will relieve him who is ready to perish, but so that I may not perish myself." And this was the meaning of the scholastic doctors, when they pronounced this rule, "Well ordered charity begins at home."

Sect. CLXII.

Moreover *negative laws*, relative to our social duties, in the case of providential necessity, interfere either with the duty of self-preservation, or with the duty of defending and increasing our perfection and happiness. Now in the former situation, since we are not obliged to love others more than ourselves, (§ 94), without doubt, in the case of necessity, every way of preserving ourselves is allowable, when a man hath not fallen under that necessity by his own neglect or default; or if the condition of the persons be equal; for equality leaves no room to

I

favour



favour or privilege. In the latter case, it is better for us to want some perfection, or some particular kind or degree of happiness, than that another should perish that we may have it \*.

\* For to want any perfection is a physical evil, if it be not our fault that we have it not. But to make another perish is a moral evil, which is always to be reckoned greater than any physical one. But since the least of two physical evils ought to be chosen, and therefore a physical evil is to be undergone rather than any moral one is to be acted, he certainly doth no evil, who in such a case chooses to save another person with some detriment to himself; wherefore, tho' he is not to be blamed who in a shipwreck catching hold of a plank which will not hold two, hinders another from getting upon it, yet he is altogether inexcusable, who by the hopes of greater happiness to himself, is induced to betray his friend against all honour and conscience.

#### Sect. CLXIII.

What if  
the neces-  
sity pro-  
ceeds from  
human  
malice?

All this holds true, if the necessity we are under be merely providential (§ 142); but if it proceeds from the malice of men, they do it either that we may perish, or that they may lay us under the necessity of acting wrong. And in the former case, since we are not bound to love any other better than ourselves, much less a bad person (§ 94); he is justly excusable who suffers another to perish rather than himself. In the latter case, the cruellest things ought to be submitted to, rather than do any thing dishonourable to God (§ 131.) \*

\* Thus, for example, if we should fall into the ambuscades or hands of robbers, every way of extricating ourselves out of this danger is allowable, because no reason binds us to prefer the safety of a robber to our own. But Joseph would have acted ill, if he had feared a prison, and chains more than adultery, to which Potiphar's wife endeavoured to seduce him.

Sect.

## Sect. CLXIV.

Having mentioned these rules, most of which have been fully explained by others \*, it will not be difficult to determine the cases proposed by Pufendorff and others. Indeed, if we attend narrowly to the matter, we will find that many proposed on this subject are such as very rarely happen, and many others are of such a nature, that all is transacted in an instant, so that there is hardly time or room for calling in reason to give its judgment of the justice, or injustice of an action; to which cases, we may not improperly apply what Terence says,

An admonition with regard to the application of these rules to particular cases.

*Facile omnes, quum valemus, cetera consilia ægrotis damus, Tu, si hic esses, aliter sentires.* Andr. 1. 1. v. 9.

For which reason, it is better to leave many of these cases to the mercy of God, than to enter into too severe a discussion of them.

\* Most of the preceding rules have been already treated of by Thomafius, Jurisp. divin. 2. 2. 143. & seq. but not upon the same principles we have here laid down. But the same author afterwards is for sequestrating them from the law of nature, and for recalling this one rule, "That all laws include a tacite exception of necessity:" but we can see no ground for omitting or sequestrating exceptions, which, what hath been said, fully proves to be founded upon, and to flow from right reason itself.

## Sect. CLXV.

Thus none can doubt but necessity will excuse a person who must let a member be cut off to prevent his perishing; or that the other parts may not be endangered by it. For tho' we owe both these duties to ourselves, viz. to preserve our life, and to preserve every member intire, yet the least of two physical evils is to be chosen (§ 160); and it is certainly a lesser evil to be deprived of a member than to lose life. It is therefore a lawful

Whether it be lawful to cut off a member.

mean of saving life to do it by the loss of a member \*.

\* But it is a more difficult question, whether it be a preceptive law of nature, and whether he does contrary to his duty, who being in the direful necessity above mentioned, chooses rather to die than to bear pain, to which he feels himself unequal; especially when it is not certain what may be the event of the amputation, seeing not fewer who have undergone the torment with great constancy have perished than have been saved. Old age, bodily infirmity, the dangerous nature of the disease, the difference in opinion among the physicians, the unskilfulness or want of experience in the surgeon, all these considerations may easily determine one to think the cure more uneligible than death itself, and to judge it better to die without suffering such exquisite pain, than run the risk of undergoing it without success. Wherefore, I would have us to remember the admonition given above, and to leave such cases to the divine judgment and mercy, rather than to pronounce hardily and rashly about them.

#### Sect. CLXVI.

Whether  
it be law-  
ful to eat  
human  
flesh in  
extreme  
necessity?

There is no doubt but that they are excusable, who in extreme hunger and want have recourse to any food, even to the flesh of dead men: for since here there is a contest between two duties towards ourselves; of two physical evils, death and detestable food, the least ought to be chosen (§ 160). But he is by no means excusable who kills another, that he may prolong a little his own miserable life by eating his flesh; for however direful and imperious the necessity of long hunger may be, it does not give us a right to another's life that we ourselves may be saved, because here the condition and necessity \* of both persons are equal (§ 162).

\* But what if all the persons being under the same fatal necessity should by consent commit it to lot to determine which of them should be sacrificed to the preservation of the rest, (as in the case of the seven Britons, quoted by Ziegler upon Grotius de jure belli & pacis, 2. 1. 3. from the

the observations of Tulpus, *Obser. medic.* 1. 43.) Here I affirm the same thing. For none hath a right to take away another's life. And he who consents to his own murder is as guilty as he who kills himself or another. Ziegler justly asserts, *ibidem* p. 189. "That none ought so far to despise his own life, as to throw it away to satisfy another's hunger, nor ought others to attack their neighbour's life to quell their own cravings." To which Pufendorff hath not given an answer altogether satisfactory, *de jure nat. & gent.* 2. 6. 3.

## Sect. CLXVII.

The case is not the same, when one in shipwreck, <sup>Whether</sup> having got upon a plank only sufficient to save <sup>in ship-</sup> himself, keeps others from it with all his force; <sup>wreck?</sup> or with those who leaping first into a boat, will not allow others, whom it cannot contain with safety, to come into it, but precipitate them into the sea; because in these cases, he who first seized the plank, or they who first got into the boat, are in possession, and therefore others have no right to deprive them of it, tho' they be in the same danger. And who will not own, that it is a less evil that a few, than that all should perish, or a greater good that a few, than that none should be saved \*?

\* Upon the same principle may the case be decided of soldiers flying into a fortified camp or city, who shut the gates against those who arrive a little later, lest the enemy should get in at the same time with them. Such was the deed of Pandarus, described by Virgil, *Æn.* 9. v. 722. & seq. and of others, of which cases, see Freinsh. ad Curt. 4. 16. 8. But in all these, we are carefully to consider whether the necessity be extreme and absolute (158), or the danger be more remote, and such as might otherwise be avoided. Hence the humanity of Darius, flying from Alexander, is very commendable, who, when he was pressed to cut the bridge over the Lycus, answered, "That he would much rather leave a passage to the pursuers, than cut it off from the flyers, Curt. 4. 16.



## Sect. CLXVIII.

Whether  
necessity  
excuses an  
execution-  
er com-  
manded  
to put an  
innocent  
person to  
death.

I can by no means think an executioner, or any other, excusable, who being commanded to put an innocent person to death, thinks he ought to obey, and that his own danger is sufficient to exculpate him. For this necessity proceeds from the wickedness of men; and in such a case every one ought to bear every thing, rather than do any thing tending to dishonour God (§ 163) \*.

\* Besides, nothing ought to be done in opposition to the certainty of conscience (§ 45): but here the executioner is supposed to know certainly the person whom he is commanded to put to death to be innocent: who then can absolve him from guilt? Nor does Pufendorff's distinction alter the case: "For tho' he says, that when an executioner merely executes the command of another, the action can no more be imputed to him than to the hatchet or sword," *jur. nat. & gent.* 1. 5. 9. 8. 1. 5. 6. yet certainly there is a wide difference between a sword or a hatchet, mere inanimate things, and a man endued with reason, whose conscience tells him the sentence he is to execute is unjust.

## Sect. CLXIX.

Whether  
it be law-  
ful to  
throw  
down one  
who is in  
our way  
when we  
fly.

But an innocent person, to save his life, may, in flying from his enemy, push out of his way, or throw down any person who stops or hinders his flight, even tho' he may have reason to suspect the person may thereby be hurt. For if one stops the person who flies with a bad intention, this necessity proceeds from human malice, and such a person really does what he can to make the person flying perish. And if one be in his way, without any intention to hurt him, this necessity is providential in respect of the flyer. But in both cases, every way of saving one's self is allowable (§ 163) \*.

We need not stay to refute the contrary opinion of Albertus. *Comp. jur. nat. orthod. conform. cap. 3. § 17.* For his argument taken from the unlawfulness of killing an innocent

innocent person in the state of integrity, is nothing to the purpose; because neither is the principle of natural law to be deduced from that state (§ 74); nor in that state can any danger be conceived that must be avoided by such an unhappy flight.

## Sect. CLXX.

The same must be said of those cases in which one is necessitated by hunger or cold to lay hold of the goods belonging to others \*; or when, in the danger of shipwreck, the goods of others must be thrown over board. For, in the first case, the necessity arises from the malice of men in suffering any to be in imminent danger from hunger or cold, (§ 163); and, in the last case, of two physical evils the least is chosen, when, in the danger of shipwreck, men perceiving that they must either perish themselves together with the goods, or make reparation to others for their goods which are cast in this necessity into the sea (§ 160) \*, throw them over board.

\* Those who differ from us in this matter call these actions *theft*, which they pronounce so great a crime that it can never be committed without guilt, even in circumstances of the most urgent necessity. But if killing a man, even according to the principles those very authors go upon, cannot be imputed to one as a crime, in the case of unblameable self-defence, why should theft be reckoned criminal by them, in the case of self-preservation? Besides, who imagines theft to be a crime when done without any malicious intention, nay without so much as any design to make profit by it? Finally, since persons in the meanest circumstances may easily, after they have extricated themselves out of their pinching straits, make reparation for the very small matter necessity can force them to take from another, who can make a crime of choosing to take a little from its lawful owner, that may be estimated and repaid, with a serious design to make reparation, so soon as it possibly can be done, rather than to perish? Add chap. 3. 19. of *theft*.

## Sect. CLXXI.

The conclusion of this chapter.

But numberless such cases may happen, or at least may be put, some of which are truly perplexed and dubious; and therefore let us not forget the admonition already mentioned (§ 164). We shall add no more upon the subject, leaving other questions to those who assume to themselves the province of commanding or guiding mens consciences,

## REMARKS on this chapter.

The principles our author hath laid down in this chapter, are most exact, and proper to decide all questions which can be proposed concerning the right, the privilege, the favour, the leave, or whatever we call it, that arises from necessity. It is however well worth while to look into what the learned Barbeyrac hath said upon this difficult subject in his notes upon Pufendorff's sixth chapter, book second, of the law of nature and nations. Pufendorff, in the beginning of that chapter, quotes an excellent passage of Cicero with regard to necessity, in which the general rule is very clearly stated. It is towards the end of his second book of *invention*; too long indeed to be inserted here, but deserving of attentive consideration. The chief design of our Author's *scholia* being to refer his readers to passages in ancient authors, where moral duties are rightly explained and urged by proper arguments, in order to shew that the duties of the law of nature are discoverable by reason, and were actually known in all ages to thinking persons, at least, he might very properly have on this occasion referred us to that place in Cicero. For this is no doubt the most perplexed subject in morals, *The right and privilege of necessity*. And upon it we find Cicero reasoning with great accuracy and solidity: insomuch, that if we compare with this passage the 25th chapter of his second book of offices, where he treats of comparing things profitable one with another; and the 3, 4, 5, and following chapters in the third book, where he considers competition between *honesty* and *interest*, or *profit*, we will find full satisfaction upon this head. In the 4th chapter of the 3d book he hath this remarkable passage.—“What is it that requires consideration on this subject? I suppose it is this, that it sometimes happens men are not so very certain, *whether the action deliberated upon be honest or not honest*.” For that which is usually counted a piece of villainy is frequently changed by the times or circumstances, and is found to be the contrary. To lay down one instance, which may serve to give some light to a great many others: pray what greater wickedness can there be upon earth (if we speak in general) than for any one to murder not only a man, but a familiar friend?

friend? And shall we therefore affirm that he is chargeable with a crime who has murdered a tyrant, tho' he were his familiar? The people of Rome, I am sure, will not say so, by whom this is counted among the greatest and most glorious actions in the world. You will say then, *Does not interest carry it against honesty?* No, but rather honesty voluntarily follows interest. If therefore, we would upon all emergencies be sure to determine ourselves aright, when that which we call our advantage or interest seems to be repugnant to that which is honest, we must lay down some general rule or measure, which, if we will make use of in judging about things, we shall never be mistaken as to point of duty. Now this measure I would have to be conformable to the doctrine and principles of the Stoics, which I principally follow throughout this work. For tho' I confess, that the ancient Academics and your Peripatetics, which were formerly the same, make honesty far preferable to that which seems one's interest: yet those who assert, that whatever is honest must be also profitable, and nothing is profitable but what is honest, talk much more bravely and heroically upon this subject than those who allow, that there are some things honest which are not profitable, and somethings profitable which are not honest." The principle of the Stoics he explains more fully a little after, where he asserts with them, "Certainly greatness and elevation of soul, as also the virtues of justice and liberality, are much more agreeable to nature and right reason than pleasure, than riches, than even life itself: to despise all which, and regard them as just nothing, when they come to be compared with the public interest, is the duty of a brave and exalted spirit: whereas to rob another for one's own advantage, is more contrary to nature than death, than pain, or any other evil whatever of that kind." This question concerning the interferences which may happen between duty and private interest, or self-preservation, will clear up, as we go on with our Author in the enquiry into our duties to others, and into the rights and bounds of self-defence; I shall only add to what our author asserts, in opposition to Pufendorff, about executioners, that if we consult the apology of Socrates by Plato, and that by Xenophon, we will find several fine passages, which shew that we ought never to obey our superiors to the prejudice of our duty; but very far from it; and unless we are in an entire incapacity to resist them, we ought to exert ourselves to the utmost of our power, and endeavour to hinder those who would oppress the innocent from doing them any mischief. See Grotius, l. 2. c. 26. § 4. 9. as also Sidney's discourse upon government, ch. 3. § 20, and Mr. Barbeyrac's notes on Pufendorff, of the law of nature and nations, b. 8. c. 1. § 6. I beg leave to subjoin, that I know nothing that can better serve to prepare one for wading through all the subtleties, with which morality in general, and this particular question about the contrariety or competition that may happen between self-love and benevolence in certain



tain cases, are perplexed, than a careful attention to two discourses upon the love of our neighbour, by Dr. Butler (Bishop of Bristol) in his excellent sermons, to copy which would take up too much room in these notes, and to abridge them without injuring them is hardly possible, with such conciseness and equal perspicuity are they wrote. These sermons make the best introduction to the doctrine of morals I have seen; and the principles laid down in them being well understood, no question in morals will afterwards be found very difficult. It is owing to not defining terms, or not using terms in a determinate fixed sense, (the terms *self-love*, *private interest*, *interested* and *disinterested*, and other such like, more particularly) that there hath been so much jangling about the foundations of morality. They who say, that no creature can possibly act but merely from self-love; and that every affection and action is to be resolved up into this one principle, say true in a certain sense of the term *self-love*. But in another sense, (in the proper and strict sense of *self-love*,) how much soever is to be allowed to it, it cannot be allowed to be the whole of our inward constitution; but there are many other parts and principles which come into it. Now, if we ought to reason with regard to a moral constitution, as we do with respect to a bodily frame, we must not reason concerning it from the consideration of one part singly or separately from the rest with which it is united; but from all the parts taken together, as they are united, and by that union constitute a particular frame or constitution. The final cause of a constitution can only be inferred from such a complex view of it. And the final cause of a constitution is but another way of expressing what may properly be called the end for which it was so framed, or the intention of its Author in so constituting it. The end of our frame therefore, and by consequence the will of our Maker with regard to our conduct, can only be inferred from the nature of our frame, or the end to which it is adapted: But if we are to infer our end from our frame, no part of this frame ought to be left out in the consideration. Wherefore, tho' self-love ought to be taken into the account, yet several particular affections must also be taken into the account; benevolence must likewise be taken into the account, if it really belongs to our nature; a sense of right and wrong, and reason must also be taken into the account; and whatever is taken into the account must be taken into it as it really is, *i. e.* affections must be considered as subjects of government, and reason must be considered as a governing principle, for such they are in their natures. But of this more afterwards, in the remark upon the duties reducible to benevolence.

## C H A P. VII.

*Concerning our absolute and perfect duties towards  
(others in general,) and of not hurting or injuring  
others (in particular.)*

## Sect. CLXXII.

**L**ET us now proceed to consider *our duties to-* The found-  
*wards others*, the foundation of which lies, dation of  
as was observed above, in this, that man is by our duties  
nature *equal* to man, and therefore every man is towards  
obliged to love every other with a love of friend- others.  
ship (§ 85 & 88). And because equality of nature  
requires equality of offices, hence we concluded,  
*that every man is obliged to love every man no less  
than himself* (§ 93).

## Sect. CLXXIII.

WE have also shewn that there are two degrees of They are  
this love, one of which we called *love of justice*, and either per-  
the other *love of humanity and beneficence* (§ 82 & seq.) fect or im-  
But because the former consists in doing nothing perfect.  
that may render one more unhappy, and therefore  
in not hurting any person, and in giving to every  
one his own, or what is due to him; and the latter  
consists in endeavouring, to the utmost of our abi-  
lity, to increase and promote another's perfection  
and happiness, and in rendering to him even what  
we do not owe to him by strict and perfect obliga-  
tion; the consequence of this is, that of the du-  
ties we owe to others, some are duties of justice,  
which are of *perfect* obligation, and others are du-  
ties of humanity and beneficence, which are of *im-  
perfect* obligation.

Sect.

## Sect. CLXXIV.

These duties defined.

Therefore those are *perfect duties*, to which one is bound by such perfect obligation, that he may be forced to perform them; such as to injure no person, and to render to every one what is due to him: those are *imperfect*, to which we cannot be forced, but are only bound by the intrinsic goodness of the actions themselves; such as, to study to promote the perfection and happiness of others to the utmost of our power (§ 84)\*.

\* *Perfect duties* therefore lay us under a necessity of not rendering any one more imperfect or more unhappy: *imperfect duties* shew us, that we then only arrive to the glory of being truly good and virtuous, when we delight in promoting the perfection and happiness of others, as much as in us lies. These duties were accurately distinguished by ancient lawyers, when with Paullus they said, some were rather of good will and virtue than of necessity (*voluntatis & officii magis quam necessitatis*) l. 17. § 3. D. *commodati*. Add to this a passage of Seneca quoted above in the scholium upon § 84.

## Sect. CLXXV.

They are divided into absolute and hypothetical.

Since *perfect duties* may be reduced to *not injuring any one, and rendering to every one his due* (§ 174); but to injure, is to render one more unhappy than he is by nature, or would otherwise be (§ 82); and one may call that his *due*, or *his own*, which he hath justly acquired (§ 82); it follows, that obligation not to injure any one is *natural*; and obligation to render to every one his due is *acquired*; whence the former is called *absolute*, and the latter we call *hypothetical* \*.

\* *Absolute duty* is what one man has a right to exact from another, without any right acquired to himself by any previous deed: *hypothetical duty* is what one can exact from another, in consequence of a right acquired by some deed. Thus a man has a right, to exact from every other that he should not take away his life, which is not acquired

acquired by any particular deed: But no person hath a right to complain, that things are taken from him by another unjustly, unless he hath acquired a right or property in them by some deed: therefore, not to kill any one is a duty of an absolute nature: but not to steal, is a duty of a hypothetical kind. If Salmasius had attended to this distinction (Salmasius de usur. cap. 9.) he would easily have understood why the lawyers said that theft is forbidden by natural law (*furtum admittere jure naturali prohibitum esse*) l. 1. § 3. D. de furt. § 1. Inst. de oblig. quæ ex delict.

## Sect. CLXXVI.

Further, since the right we acquire to any thing arises either from *dominion*, or from *compact* or *convention*, it follows that all *hypothetical* duties spring either from *compact* or from *dominion*; and therefore this will be the properest order we can follow, to begin first with considering *perfect absolute* duties, and then to treat of *imperfect* ones; next to speak of those *hypothetical* duties, which arise from *dominion* or *property*; and lastly, to handle those which arise from *compact*. But *imperfect* ones ought to be considered before we come to the *hypothetical* ones, because after *dominion* and *compacts* were introduced into the world, humanity becoming very cold and languid, men have sadly degenerated into selfishness.

## Sect. CLXXVII.

First of all, it ought to be laid down as a maxim, that men are by nature equal (§172), being composed of the same essential parts; and because tho' one man may share perfections, as it were by his good lot, above others, yet different degrees of perfection do not alter the essence of man, but all men are equally men: whence it follows, that every one ought to treat every other as equally a man with himself, and not to arrogate to himself any privilege in things belonging to many by perfect right, without a just cause; and therefore not to do to any



any other what he would not have done to himself (§ 88).

\* This rule is so agreeable and so manifest to right reason, that it was known to the Pagans. Lampridius tells us, that Alexander Severus delighted in this maxim. cap. 1. "He had this sentence, says he, frequently in his mouth, which he had learned from Jews or Christians: "Do not to others what you would not have done to yourself." And he ordered it to be proclaimed aloud by a public crier, when he was to correct or animadvert upon any person. He was so charmed with it, that he ordered it to be inscribed every where in his palace, and on all public works." It is not improbable, as Lampridius observes, that Alexander had learned this maxim from Christians: For we find it in the affirmative sense, Mat. vii. 12. and Luke vi. 31. But it does not follow from hence, that reason could not have discovered this truth. We find similar precepts and maxims in Simplicius upon Epicetus Enchirid. cap. 37.

#### Sect. CLXXVIII.

And then  
no person  
ought to  
be injured.

Since therefore we ought not to do to any one what we would not have done to ourselves (§ 177); but none of us would like to be deprived by any other of our perfection and happiness which we have by nature, or have justly acquired; *i. e.* to be injured or hurt (§ 82); the consequence is, that we ought not to render any one more imperfect or unhappy, *i. e.* injure any one. And because to what constitutes our felicity and perfection, belongs not only our *body*, but more especially our *mind*, this precept must extend to both these parts, and an injury to our mind must be as much greater than an injury to our bodily part, as the mind is more excellent than the body \*.

\* Hence Epicetus severely reproaches those who look upon that only as an injury by which their body or their outward possessions are impaired, and not that by which their mind is rendered worse. "When we have received any damage in what belongs to our bodies or estates, we  
imme-

immediately think we have suffered a great loss. But when any detriment happens to us with respect to our will or temper, we think we have suffered no damage, for as much as he who corrupts or is corrupted by another, hath neither an aking head, stomach, eye or side, nor hath not lost his estate; and we look no farther than to these outward things. But with us it admits no dispute, whether it be better to have a pure and honest will, or an impure and dishonest one, &c." Arrian. *Diff. Epict.* 2. 10.

## Sect. CLXXIX.

The perfection and happiness of man consists in *life, i. e.* in the union of his soul and body (§ 143), which is of all he hath received from nature the most excellent gift, and is indeed the basis or foundation of all the rest: since therefore it is unlawful to deprive any one of the perfection and happiness he hath received from nature, and we would not choose to have our life taken away by another, (§ 178), it is self-evident, that it is our duty not to kill any person; not to do the least detriment to his health; not to give any occasion to his sickness, pain, or death, or not to expose him to any danger, without having a right to do it, or with an intention to have him killed.

No person may be killed, no injury may be done to one's body, health, &c.

\* For he who exposes a person, over whom he hath no authority, to danger, is no less guilty than he who, abusing his right and power to command, exposes one whose death he desires, to danger, purposely that he may get rid of him. There are examples of this in Polybius, 1. 9. Diod. Sic. Bibl. 14. 73. 19. 48. Justin. Hist. 12. 5. Curt. 7. 2. and likewise in the sacred writings, 2 Sam. xi. 15. and xii. 9. where Nathan accuses David of murder for having placed Uriah in a most dangerous situation, with intention that he might perish. See Pufend. *de jure nat. & gent.* 8. 2. 4.

## Sect. CLXXX.

Yet since none is obliged to love another more than himself (§ 94), and it may often hap-

Unless necessity obliges to lawful self-defence.

pen that either one's self or another must perish; the consequence is, that in case any one attack us, in this doubtful state of danger, every way of saving one's self is lawful (§ 163); and therefore we may even kill an aggressor, provided we do not exceed the limits of just self-defence.

## Sect. CLXXXI.

*Its limits.* But what are the limits of just self-defence none will be at a loss to understand, who calls to mind, that absolute or inevitable necessity merits favour, (§ 158): For hence it follows, That blameless self-defence takes place, if one be in absolute necessity, or even in relative necessity, provided he be so, not by his own fault (§ 158): That all danger being past, there is no further any right of defence: That when danger can be avoided without hurting the aggressor, or by a lesser evil, there is no right to kill him\*; because of two evils the least ought always to be chosen.

\* Man is always bound to choose that which is best, (§ 92); but that is best which is the safest and easiest mean for obtaining our end. We are therefore obliged to take the safest and least hurtful mean of saving ourselves, and therefore to avoid killing a person, if there be any other way of delivering ourselves from danger. Theocritus says rightly, "It is fit to remove a great contention by a small evil."

## Sect. CLXXXII.

*Against whom we may use it.* These evident principles being attended to, nothing can be more easy than to answer all the questions which are commonly proposed with relation to due moderation in self-defence. For if it be asked against whom it is allowable, you will answer rightly, if you say, against all by whom we are brought into danger without any fault of our own (§ 81); and therefore even against mad persons, persons disordered in their senses, and even against those who

who attack you by mistake, when they are intending to assault another. For as Grotius of the rights of war and peace, 2. 1. 3. has well observed, the right of self-defence in such cases does not proceed from his injustice or fault, by whom the danger is occasioned, but from our own right of repelling all danger by any means, and of not preferring in such circumstances the life or safety of another to our own \*.

\* And to this belongs the fable of Oedipus, who having unknowingly killed his father, who attacked him, in his own defence, thus excuses himself in Sophocles, in Oedip. v. 1032. "Answer me one thing. If any one should attack you, even a just person, to kill you, would you ask whether it was your father, or would you not immediately defend yourself? I think, if you loved your life, you would defend yourself against the aggressor, and not stay to consider what was just. I fell into such a misfortune by fate, as my father, could he revive, would himself acknowledge."

## Sect. CLXXXIII.

Nor will it be less easy to determine how long <sup>The ex-</sup> this right of defence against an aggressor continues, <sup>tent of it</sup> For here doctors justly distinguish between those <sup>in a state</sup> living in a state of nature, and subject to no magi- <sup>of natural</sup> strate, by whom they may be defended and pro- <sup>liberty.</sup> tected, and those who live in a civil state, and under magistracy. For since, in a state of natural liberty, there is none to protect us against injuries, our right of self-defence cannot but begin the moment our danger commences, and cannot but continue while it lasts, or till we are absolutely secure, (§ 181). But our danger begins the moment one shews a hostile disposition against us, and while that continues, our right of self-defence lasts.

\* And this is the foundation of the whole rights of war, *viz.* that we may carry on acts of hostility against any person who hath clearly shown his hostile disposition against us, and refuses obstinately all equal terms of peace,

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till



till having laid aside his enmity, he is become our friend: of which afterwards in its own place.

## Sect. CLXXXIV.

And in a civil state. On the other hand, in a civil state, one who shews enmity against another, trapps, or lays snares for him, may be coerced by the civil magistrate; the consequence of which is, that a member of a civil state, hath not a right, by his own force and arms, to resist another member who attacks him, or lays snares for him; nor, when the danger is over, to take that revenge at his own hand which he might expect from the magistrate. And therefore, the space or time of just self-defence is confined within much narrower limits in that state; it begins with the danger, and lasts no longer than the danger itself lasts \*.

\* And therefore the lawyers rightly permit violent self-defence, only in the moment of assault. Ulpian, l. 3. § 9. D. de vi & armis. "We may repel him by force who assaults us with arms, but in the moment, and not some time after." And Paullus more expressly in another place, where he says, "That one who throws a stone against one rushing upon him, when he could not otherwise defend himself, was not guilty by the Lex Aquil. l. 45. § 4. D. ad leg. Aquil.

## Sect. CLXXXV.

The measure of violent self-defence. Moreover, from these principles (§ 181), you may easily see that self-defence to the point of killing the aggressor is not lawful; if one was forewarned of the assault, or foreseeing it in time, could have kept at home, or retired into a safer place, or could, by wounding or maiming the injurious person, disable him \*: tho' no person, when he is assaulted, be absolutely obliged to betake himself to flight, because of the danger or uncertainty of it, unless there be near at hand a place of most secure refuge, (Pufen-

(Pufendorff of the law of nature and nations, 2. 5. 13.). But upon this head it is proper to observe, that under civil governments, the time of making an unblameable self-defence being confined within very narrow bounds, and indeed almost reduced to a point or instant, since, in such a perturbation of mind, one cannot think of all the ways of escaping; therefore, with good reason, such cases ought not to be too rigidly exacted, but great allowances ought to be made.

\* Much less then can one with right have recourse to force and killing, after the aggressor desists, and shews he is reconciled to his adversary. Whence Aristides in Leuctric. 1. justly observes, "That the Thebans being disposed to all that was equal, and the Lacedemonians being obstinate, the goodness of the cause was transferred from the latter to the former." See Grotius, 2. 1. 18. and Pufendorff, 2. 5. 19.

## Sect. CLXXXVI.

Hence we may likewise perceive for what things one may proceed to self-defence by force and violence: for since some calamities are bitterer to man than death, and not only extreme necessity, but even that which may be undergone with safety to our life, merits favour (§ 158); the consequence is, that what is allowable for the sake of life, is permitted likewise in defence of health, the soundness of our bodies, and even our chastity\*; and likewise in defence of magistrates, parents, children, friends, and all others whom we find in danger.

\* But here many differ from us, as Augustinus de libero arbitrio, 1. 5. Thomasius, Jurisp. 2. 2. 114. Buddeus Theolog. mor. part. 2. c. 3. § 3. because chastity being a virtue of the mind, cannot be forced or extorted from us. But tho' the chastity of the mind be secure enough, yet no injury is more atrocious to a chaste virgin or matron than a rape. Wherefore, Quintilian says justly, Declam. 349. "You have brought an injury upon the girl,

than which war hath nothing more terrible." Who then will blame an honest woman for defending herself against so high an injury, even at the expence of the ravisher's life?

## Sect. CLXXXVII.

Whether it be allowable in defence of our honour and reputation?

The question, whether one is excusable for killing another in defence of his honour and reputation, *e. g.* for a box on the ear, or some more slight injury, is more difficult. But tho' nothing be more valuable, life only excepted, than honour; and therefore some think, that in this case violent self-defence is not unlawful; (see Grotius of the rights of war and peace, 2. 1. 10.) yet because the danger of losing life, or other things upon an equal footing with life, alone give us the right to blameless self-defence (§ 186); and because honour and reputation are not lost by an injury done to us; and there are not wanting in civil governments lawful means of revenging an injury; we cannot choose but assent to their opinion, who prudently affirm, that the right of violent self-defence ceases in these cases.

## Sect. CLXXXVIII.

No person ought to be injured with regard to his understanding.

Again, the absolute duty of not hurting any person extends no less to the *mind* than to the body (§ 178), and the faculties of the mind are *will* and *understanding*: as to the first therefore, none can deny that he greatly injures a person, who seduces into error a young person, or any one of less acute parts than himself by falshood and specious sophistry; or who prepossesses any one with false opinions, or he who, even by a tedious disagreeable method of teaching, or affected severity, begets, in any one committed to his charge, an aversion to truth and the study of wisdom\*.

\* Thus Petrus did a very great injury to Maximilian I. Emp. of whom Cuspinianus relates, p. 602. "Maximilian when he was of a proper age for being instructed in letters,

letters, was put under the care of Petrus, where he learned Latin for some time with other fellow scholars of quality. But his teacher employed all his time in inculcating upon him certain logical subtleties, for which he had no disposition or capacity; and being often whipped on that account by one who better deserved to be whipt himself, seeing such usage is for slaves and not free-men, he at last conceived an utter disgust at all learning, instead of being in love with it." He never forgot what a detriment that was to him. The same Cuspinianus tells us, that he often complained very heartily of his fate, and sometimes said at dinner, while many were present, "If my preceptor Petrus were alive, tho' we owe much to our teachers, I would make him repent his having had the care of my institution," Add. Ger. a Roo. l. 8. p. 288.

## Sect. CLXXXIX.

Now because that injury done to the *will*, which Nor with is called *corruption*, is no less detrimental to one; respect to the consequence is, that they act contrary to their duty who corrupt any person, by alluring him to pursue unlawful pleasures, or to commit any vice, and either by vitious discourse or example, debauch his mind; or when they have it in their power, and ought to restrain one from a vitious action, and reclaim him into the right course of life, either do it not, or set not about it with that serious concern which becomes them; but, on the contrary, do all that lies in them to forward him in his vitious carrier\*.

\* How great an injury this is, Dionysius the Sicilian tyrant well knew, who being desirous to give pain to Dion, who he heard was levying an army, and preparing to make war against him, ordered his son "to be educated in such a manner, that by indulgence he might be corrupted with the vilest passions: for which effect, while he was yet a beardless boy, whores were brought to him, and he was not allowed to be sober one minute, but was kept for ever carousing, reveling and feasting. He afterwards, when he returned to his father, could not bear a change of life, and guardians being set over him to reform



him from this wicked way of living he had been inured to and bred up in, he threw himself from the top of the house, and so perished." Corn. Nep. Dion. cap. 4. This art was not unknown to the Romans. Examples of treating their enemies, or their suspected friends in this manner, are to be found in Tacitus Hist. 4. 64. and Agricola's life, 21. 1. This secret tyranny is taken notice of by Forstner upon Tacitus's annals, l. 1. I wish then, that from such examples, youth easily corrupted into a vitious taste and temper, and averse to admonitions, would learn this profitable lesson, to look upon those as their worst enemies who endeavour to seduce them from the paths of virtue into luxury and softness, and to consider them as tyrants to whom they are really in bondage, who set themselves to deprave their morals.

## Sect. CXC.

Nor with  
respect to  
the body.

Since it is not more allowable to hurt one's *body* than his mind (§ 178), it is certainly unlawful to beat, strike, hurt, injure, wound any one in any manner or degree, or to maim any member or part of his body; to torment him by starving, pinching, shackling him, or in any other way; or by taking from him, or diminishing any of the things he stands in need of in order to live agreeably and comfortably; or, in one word, to do any thing to any one by which his body, which he received from nature sound and intire, can, by the malice or fault of another, suffer any wrong or detriment. Because since we ourselves certainly are so abhorrent of all these things, that death itself does not appear less cruel to us than such injuries do; surely what we would not have done to ourselves by others, we ought not to do to them, and we must, for that very reason, or by that very feeling, know that we ought not to do so to them \*.

\* And hence it seems to be, that by many ancient laws, retaliation was proposed against those who broke or hurt any member of another person. See Exod. xxi. 23. Lev. xxiv. 50. Aulus Gellius, Noct. Attic. xx. 1. Diod. Sicul.

Sicul. xii. 17. For tho' it be not probable, that either among the Hebrews or the Romans, this law of retaliation took place (*κατὰ τὸ ἰσχυρὸν*) strictly: (Joseph. antiq. Jud. 4. 7. Gellius 20. 1.) yet by this it appears, that the best law-givers acknowledged it to be most just, that one should not do to another what he would not have done to himself.

## Sect. CXCI.

As to the state or condition of man, to this article chiefly belongs *reputation*, not only a simple good name, or being looked upon not as a bad person, but likewise the superior reputation one deserves by his superior merits above others; (for of wealth and possessions, which cannot be conceived without dominion or property, we are afterwards to speak). Now, seeing one's fame cannot but be hurt by *calumnies* (§ 154), or deeds and words tending to disgrace one, which we call *injuries*; it is as clear and certain that we ought to abstain from all these, as it is, that we ourselves take them in very ill part \*.

\* Therefore Simplicius upon Epictetus Enchirid. cap. 38. p. 247. calls contumelies and such injuries, evils contrary to nature, nay diseases, spots in the soul. But what is contrary to the nature of the mind is certainly an evil, and what is such, cannot but be contrary to the law of nature, which obliges us to do good.

## Sect. CXCII.

Besides, the condition of a person may be wronged in respect of *chastity*, because being thus corrupted by violence, or by flattery, one's good name suffers, and the tranquillity of families is disturbed, (§ 178); whence it is plain, that we ought not to lay snares against one's chastity, and that all uncleanness, whether violently forced, or voluntary; and much more, adultery, and other such abominable, cruel injuries, are absolutely contrary to the law of nature \*.

\* For tho' when both the parties consent, the maxim, "Do not to another what you would not have done to yourself," ceases; yet, first of all, in general, none desires any thing to be done to him that would render him less happy. But he is more unhappy, who is allured by temptations to pleasure, or to any vice. His will is hurt or injured (§ 189). Again, others very often are wronged, such as parents, husbands, relations, and at least, with regard to them, the debaucher violates the maxim, "Do not to another what you would not have done to you." Finally, he who seduces a woman into lewdness, corrupts her. But since, if we are wise, we would not choose to be corrupted ourselves by guileful arts, neither ought we to have any hand in corrupting any person. So far is seduction of a woman by flattery into unchastity from being excusable, that some lawyers have thought it deserving of severer punishment than force, "Because those who use force, they thought, must be hated by them to whom the injury is offered; whereas those who by flattering insinuations endeavour to persuade into the crime, so pervert the minds of those they endeavour to debauch, that they often render wives more loving and attached to them than to their husbands, and thus are masters of the whole house, and make it uncertain whether the children be the husband's or the adulterer's." *Lyfias, Orat. 1.*

## Sect. CXCIIL.

One may  
be injur-  
ed by  
thoughts,  
gestures,  
words, and  
deeds.

From what hath been said, it is plain enough that a person may be wronged even by internal actions; *i. e.* by *thoughts* intended to one's prejudice, as well as by external actions, as *gestures*, *words*, and *deeds* (§ 18); whence it follows, that even hatred, contempt, envy, and other such vices of the mind, are repugnant to the law of nature. And that we ought to abstain from all gestures shewing hatred, contempt, or envy, and what may give the least disturbance to the mind of any person. But that hurt, which consists in words and deeds, is accounted greatest (*in foro humano*) in human courts of judicature \*.

\* Because

\* Because the author of the law of nature is *καρδιο-  
νομος*, a *discerner of hearts*, he undoubtedly no less violates  
his will, who indulges any thought contrary to his com-  
mands, than he who transgresses them by words or deeds :  
and for that reason we have observed above, that the law  
of nature extends to internal as well as external actions  
(§ 18). Besides, love being the genuine principle or foun-  
dation of the law of nature (§ 79), which does not consist  
principally in the external action, but in the desire of good  
to the object beloved, and delight in its happiness and per-  
fection (§ 80), it must needs be contrary to the law of na-  
ture to hate any person, and to delight in his unhappiness and  
imperfection : or to have an aversion to his happiness and  
perfection, though it should consist merely in thought and  
internal motion, must be repugnant to that law. Hence  
our Saviour, the best interpreter of divine law, natural or  
positive, condemns even thoughts and internal actions re-  
pugnant to the law of nature, Matt. v. 22. 28. And this  
we thought proper to oppose to those who assert, that the  
law of nature extends to external actions only.

## Sect. CXCIV.

Because a person may be hurt by *words* or *dis-* The fa-  
*course* (§ 193), it is worth while to enquire a little *culty of*  
more accurately into our duties with relation to *speech* *dis-*  
*speech*. For such is the bounty of the kind author *tinguishes*  
of nature towards us, that he hath not only given us *man above*  
minds to perceive, judge and reason, and to pursue *the brute*  
good, but likewise the faculty of communicating *creation.*  
our sentiments to others, that they may know our  
thoughts and inclinations. For tho' the brutes, we  
see, can express, by neighing, hissing, grunting,  
bellowing, and other obscure ways, their feelings \*,  
yet to man is given the superior faculty of distinct-  
ly signifying his thoughts by words, and thus mak-  
ing his mind certainly known to others.

\* Thus a dog expresses anger by one sound, grief by an-  
other, love to mankind by another, and other affections  
by other sounds : but he does not distinctly or clearly ex-  
press his particular thought, nor can he do it, tho' dogs  
and many other animals have almost the same organs of  
speech



speech with which man is furnished. The more imperfect an animal is, the less capable is it of uttering any sound whereby it can give any indication of its sensations, as fishes, oysters, for instance, and other shell-fish. And therefore Pythagoras really affronted men's understandings when he pretended to understand the language of brute animals, and to have had conversation with them, and by this shewed either a very fantastical turn of mind, or a design to impose upon others. See Iamblichus's life of Pythagoras, cap. 13.

## Sect CXCV.

What discourse is. Seeing what peculiarly distinguishes us from the brutes, with relation to speech, consists in our being able clearly to communicate our thoughts to others, (§ 193), which experience tells us we do by articulate sounds \*; *i. e.* by sounds so diversified by our organs of speech as to form different words, by which all things, and all their affections and properties or modes may be expressed; therefore discourse is articulated sound, by which we impart the thoughts of our minds to others distinctly and clearly.

\* Human genius hath not rested in finding certain and determinate names for all things, but hath invented other signs to be used in place of discourse, when there is no opportunity for it. Thus we have found out the way of communicating our minds to distant persons by the figures of letters so distinctly, that they do not hear but see our words: which is so surprising an invention, that some have ascribed it to God. There is also a method of speaking, as it were by the fingers, invented in Turkey by the dumb, and very familiar to the nobles in that country, as Ricaut tells us in his description of the Ottoman empire, cap. 7. 12: Not to mention speaking with the eyes and the feet, upon which there are curious dissertations by Mollerus Abtorffensis. Tho' all these do not deserve to be called *speech*, yet they supply the place of it; and therefore, whatever is just or obligatory with regard to speech, holds equally with regard to them.

Sect.

## Sect. CXCVI.

From this definition is is obvious enough, that the faculty of speech is given us, not for the sake of God, nor of brutes, but for our own advantage, and that of our kind ; and therefore, that God wills that by it we should communicate our thoughts to others agreeably to the love he requires of us : for which reason, he wills that we should not injure any one by our discourse, but employ it, as far as is in our power, to our own benefit, and the advantage of others.

\* We say rightly, that the faculty of speech was not given us for the sake of God, since God without that assistance intimately knows our most secret motions and thoughts : nor for the sake of the brutes, who do not understand our discourse as such, or any otherwise than they do other signs to which they are accustomed. And therefore it remains, that it can be given us for no other reason but for the sake of ourselves and other men. But it cannot be given us for our own sake, in order to our communicating our thoughts to ourselves, of which we are immediately conscious ; but that we may inform others what we would have done to us, and in what they may be useful to us. And for the sake of others it is given to us, that we may signify to them what it is their interest to know, or what may be of use to them. Since therefore we ought to love others equally as ourselves, and what we would not have others to do to us, we ought not to do to others ; the plain consequence is, that we are obliged not to hurt any one by our discourse, but to endeavour to be as useful as we can to others by it.

## Sect. CXCVII.

The design of discourse being to communicate our sentiments to others (§ 196), which is done by articulate sounds, denominating things, and their affections, modes, qualities, and properties (§ 195) ; it follows, that being to speak to others, we ought not to affix any meaning to words but what they are intended and used to signify in common discourse ;

or

or if we make use of uncommon words, or employ them in a less ordinary acceptation, we ought accurately to explain our mind. But no person has reason to be displeased, if we use words in a sense they have been taken in by those acquainted with languages, or which is received at the present time, if the construction of words and other circumstances admit of it,

## Sect. CXCVIII.

No person ought to be wronged by discourse.

And since God wills that we communicate the sentiments of our mind to others by speech, agreeably to the love of others he requires of us by his law (§ 196); which love does not permit us to hurt any person by our discourse: but it is to injure a person, to detract any thing from his perfection or felicity (§ 82): hence it follows, that we ought, not to hide from any one any thing, the knowledge of which he hath either a perfect or imperfect right \* to exact from us; not to speak falsehood in that case; not to mislead any person into error, or do him any detriment by our discourse.

\* *Perfect right* is the correlate to perfect obligation, *imperfect right* to imperfect obligation. The former requires that we should not wrong any person, but render to every one his own (§ 174): And therefore every one can as often demand from us by perfect right the truth, as he would be hurt by our dissimulation, by our speaking falsely, or by our disguising and adulterating the truth: or as often as by compact, or by the nature of the business itself which we have with another, we owe it to him to speak the truth. And since the latter obliges us by internal obligation, or regard to virtue, to promote the perfection and happiness of others to the utmost of our power, it is very manifest that we are obliged to speak the truth openly, and without dissimulation, as often as another's happiness or perfection may be advanced by our discourse. He therefore offends against the perfect right of another, who knowing snares to be laid for him by an assassin, conceals it, or persuades him that the assassin only comes to

to him to pay his compliments; as likewise does he, who having undertaken the custody of another's goods, knowingly hides the breaking in of thieves, or endeavours to make them pass for travellers come to lodge with him. He acts contrary to the imperfect right of another, who when one is out of his way, denies he knows the right road, tho' he know it, or directly puts him into the wrong one.

Sect. CXCIX.

He who conceals what another has a perfect or imperfect right to demand certain and true information of from him, *dissembles*. He who in that case speaks what is false, in order to hurt another, *lies*. Finally, he who misleads any one to whom he bears ill-will into an error, *deceives* him. Now, by these definitions, compared with the preceding paragraph, it is abundantly plain, that dissimulation, as we have defined it, and all lying and deception, are contrary to the law of nature and nations.

Sect. CC.

But since we are bound to love others, not with greater love than ourselves, but with equal love, (§ 94); the consequence is, that it is lawful to be silent, if our speaking, instead of being advantageous to any person, would be detrimental to ourselves or to others: and that it is not unlawful to speak falsely or ambiguously, if another have no right to exact the truth from us (§ 198); or if by open discourse to him, whom, indecency, we cannot but answer, no advantage would redound to him, and great disadvantage would accrue from it to ourselves or others; or when, by such discourse with one, he himself not only suffers no hurt, but receives great advantage.

\* Thus, none will blame a merchant, if being asked by some over curious person how rich he might be, he should not make any answer, or should turn the conversation some other way. Nor ought a General more to be blamed

who



who deceives the enemy by false reports or ambiguous rumours, because an enemy, as such, hath no right, perfect or imperfect, to demand the truth from an enemy as such. Moreover, the prudence of Athanasius is rather commendable than blameable, who detained those who were pursuing him with such ambiguous conversation, that they knew not it was Athanasius with whom they were conversing, Theodoret. Hist. Eccl. 3. 8. For he could not remain silent without danger, and plain discourse would not have been of any advantage to his pursuers, and of great hurt to himself. Finally, none can doubt but a teacher may lawfully employ fables, fictions, parables, symbols, riddles, in order to suit himself to the capacity of his hearers, and insinuate truth into their minds through these channels, since these methods of instruction are far from being hurtful to any persons, and are very profitable to his hearers.

## Sect. CCI.

What is meant by taciturnity, what by false speech, and what by fiction. Hence we may infer, that all *disimulation* is unjust (§ 199), but not all *silence*: (by which we mean, not speaking out that to another which we are neither perfectly nor imperfectly obliged to discover to him (§ 200;)) that all *lying* is unjust (§ 199), but not all *false speaking* (§ 200); that all *deception* is unjust (§ 199); but not all *ingenious* or *feigned discourse* (§ 200). And therefore all these must be carefully distinguished, if we would not deceive ourselves, and make a false judgment concerning them \*.

\* Amongst the Greeks the word *ψεύδος* was somewhat ambiguous, signifying both *a lie* and *false speech*. Demosthenes takes it in the first sense in that saying so familiar to him, "That there is nothing by which we can hurt others more than by (*ἢ ψεύδῃ λέγων*) lies." Chariclea understands by it false speech, in that famous apophthegm of his, "That false speaking (*τὸ ψεύδος*) is sometimes good, viz. when it is in such a manner advantageous to the speaker as to hurt no other body." Heliod. Æthiop. l. 1. c. 3. p. 52. But the word *lie* is not one of these ambiguous words, but being always used to signify a base and detestable

detestable vice, ought to be distinguished from false speaking, and the other words we have above mentioned.

Sect. CCII.

The same holds with respect to *truth* and *veracity*. For since one is said to be a person of *veracity*, who speaks the truth without dissimulation, whenever one has a perfect or imperfect right to know the truth from us; the consequence is, that *veracity* always means a commendable quality. On the other hand, speaking *truth* may be good, bad, or indifferent; because it consists in the agreement of words and external signs with our thoughts, and one does not always do his duty who lays open his thoughts \*.

What truth and veracity mean.

\* It is a known apophthegm of Syracides. (*sapienti os in corde, stulto cor in ore esse*, a wise man's mouth is in his heart, and a fool's heart is in his mouth). A rich person who discovers his treasures to thieves tells truth, but none will on that account commend his virtue and veracity: whereas, on the other hand, he would not be reproached with making a lie who kept silent to a thief, or turned the discourse another way (§ 200). Hence the saying of Simonides, "That he had often repented of speaking, but never of silence." And that of Thales, "That few words are a mark of a prudent man." To which many such like aphorisms might be added.

Sect. CCIII.

Words, by which we seriously assert that we are speaking truth, and not falsely, are called *asseverations*. An asseveration made by invoking God as our judge, is called an *oath*. Words by which we wish good things to a person, or pray to God for his prosperity, are called *benedictions*. Words by which we, in the heat of our wrath, wish ill to our neighbour, is commonly called *malediction* or *curse*. When we imprecate calamities upon our own heads, it is called *execration*.

What is meant by an asseveration, what by an oath, what by benediction, and what by imprecation.

Sect.

## Sect. CCIV.

When it  
is allow-  
ble to use  
assevera-  
tions.

From the definition of an asseveration (§ 203), it is plain that no good man will use it rashly or unnecessarily, but then only, when a person, without any cause, calls what he says into doubt, and he cannot otherwise convince him of the truth whose interest it is to believe it; whence we may conclude, that he acts greatly against duty, who employs asseverations to hurt and deceive any one.

\* For since to circumvent and deceive a person, is itself base and unjust (§ 199), what can be more abominable or unjust, than to deceive by asseverations? And hence that form used among the Romans, "As among good men there ought to be fair dealing," "That I may not be taken in and deceived by putting trust in you, and on your account." Cicero, *de off.* l. 3. 16. For it is base to cheat and defraud any one; and it is much more base to cheat and defraud by means of one's credit with another. See Franc. Car. Conradi *de pacto fiduc. exerc.* 2. § 4.

## Sect. CCV.

When it  
is allowa-  
ble to use  
benedic-  
tions, and  
when im-  
preca-  
tions.

Since we desire happiness no less to those we love, and in whose felicity we delight, than to ourselves, it cannot be evil to wish well to another, and pray for all blessings upon him, provided it be done seriously and from love; and not customarily and in mere compliment\*. But all maledictions breath hatred, and are therefore unjust, unless when one with commiseration only represents to wicked persons the curses God hath already threatened against their practices. Finally, execrations; being contrary to the love we owe to ourselves, and the effects of immoderate anger and despair; are never excusable; but here, while we are examining matters by reason, certain heroic examples do not come into the consideration, they belong to another chair.

\* And therefore many congratulatory acclamations, which on various occasions are addressed to illustrious persons

sons and men in power, degenerate into flatteries: nay, sometimes they are poison covered over with honey, because at the very time these fair speeches are made, the person's ruin is desired, if snares be not actually laid for him. Since all this proceeds not from love but hatred, who can doubt of their being repugnant to the law of nature, which is the law of love?

## Sect. CCVI.

As to an *oath*, which is an asseveration by which God is invoked as a witness or avenger (§ 203), since we ought not to use a simple asseveration rashly or unnecessarily (§ 204); much less certainly ought we to have recourse rashly or unnecessarily to an oath; but then only when it is required by a superior as judge; or by a private person, in a case where love obliges us to satisfy one fully of the truth, and to remove all suspicion and fear of deception and falsity. And this takes place with regard to every oath, and therefore there is no need of so many divisions of oaths into *promissory* and *affirmatory*, and the latter into an oath for bearing *witness*, and an oath decisive of a *controversy*: for the same rules and conditions obtain with respect to them all \*.

\* Besides; if we carefully examine the matter, we shall find that every oath is *promissory*. For whoever swears, whether the oath be imposed by a judge, or by an adversary, he promises to speak the truth sincerely and honestly. And the distinctions between oaths about contracts past or future, the former of which is called an *oath of confirmation*, and the other a *promissory oath*; an oath about the deed of another, and an oath about our own deed, the former of which is called an *oath of testimony*, the other a *decisory oath*, which again, if it be tendered by the judge is called *judicial*, if by the party, without judgment, *voluntary*: these and other decisions belong rather to Roman law than to Natural law, as is plain from their not being in use in several other nations, as the Greeks and Hebrews. See Cod. Talmud. tom. 4. edit. Surenhus. Maimonides de jurejurando, edit. Diethmar. Leiden 1706. Selden de Synedr. Heb. xi. 11. Jac. Lydius

What is  
the use of  
an oath?



dius de juramento. To which may be added what Petit and other writers on antiquities say of the use of an oath among the Greeks.

## Sect. CCVII.

Who and  
how.

Since by those who swear God is invoked as a witness and avenger (§ 203), the consequence is, that atheists must make light of an oath, and that it is no small crime to tender an oath to such persons; that an oath ought to be suited to the forms and rites of every one's religion\*; and therefore asseverations by things not reckoned sacred, cannot be called oaths; that he is justly punished for perjury, who perjures himself by invoking false gods; nay, that even an atheist is justly punished for perjury, who concealing or dissembling his atheistical opinions, swears falsely by God, seeing he thereby deceives others.

\* Provided the form doth not tend to dishonour the true God, because such actions are not excusable even by extreme necessity (§ 160). Hence it is plain, that an oath tendered to a Jew may be suited to his religion, because such a form contains nothing which tends to the dishonour of the true God. But I doubt whether it be lawful for a Christian judge to order a Mahometan to swear before him by Mahomet, as the greatest prophet of the one God, especially since the nature of the Mahometan religion is not such, that an oath by the true God, the Creator of heaven and earth, does not equally bind them to truth, as if they at the same time made mention of that impostor.

## Sect. CCVIII.

How an  
oath  
ought to  
be admin-  
istered.

Moreover, since one ought not to swear rashly, or without being called to it (206); hence it follows, that an oath is made for the sake, not of the swearer, but of him who puts it to the swearer; and therefore it ought to be understood and explained by his mind and intention, and not according to that of the person sworn; for which reason,  
all

all those equivocations and mental reservations, as they are called, by which wicked men endeavour to elude the obligation of an oath, are most absurd. Those interpretations of oaths are likewise absurd, which require base or unreasonable things of one, who of his own accord had sworn to another not to refuse him any thing he should ask of him\*.

\* Tho' he be guilty in many respects, who takes such an oath, because he does it of himself, unnecessarily and without being called to it (§ 206); and because he thus swears before hand not to refuse, without knowing what the person may demand, and so exposes himself either to the danger of perjury, or of a rash oath: yet by such an oath no person is bound to fulfil what he promised by his oath, if the other, taking advantage of it, requires any thing of him that is impossible, unjust or base. For since he swore voluntarily, and of his free accord, his oath ought without doubt to be interpreted according to his own mind and intention. But no man in his senses can be supposed to mean, to bind himself to any thing which cannot be done, either through physical impossibility, or on account of legal prohibition. Herod therefore sinned, Mat. xiv. in promising to his daughter by a rash oath to grant her whatever she should demand of him; but he was yet more guilty in yielding to her when she desired John the Baptist's head.

## Sect. CCIX.

Again, an oath being an invocation of God, The obligation and effects of an oath. (§ 203), it follows that it ought to be religiously fulfilled; that it cannot be eluded by quibbles and equivocations, but that the obligation of an oath must yield to that of law: and therefore that it can produce no obligation, if one swears to do any thing that is base and forbidden by law; tho' if it be not directly contrary to law, it be absolutely binding, provided it was neither extorted by unjust violence, nor obtained by deceit (§ 107 & 109): whence is manifest what ought to be said of the maxim of the *canonists*, "That every oath ought

to be performed which can be so without any detriment to our eternal happiness."

\* It comes under the definition of *evasion*, *cavillatio*, if one satisfies the words, but not the mind and intention of the imposer: the impiety of which is evident. He who thinks of satisfying an oath by evasion or equivocation, deceives another. But to deceive any person is in itself unjust (§ 199): it must be therefore much more unjust to deceive one by invoking God to witness, and as judge and avenger. An oath then excludes all cavils. Hence it is plain that Hatto archbishop of Mentz was guilty of perjury, when, having promised to Albertus, that he would bring him back safe to his castle, pretending hunger, he brought him back to breakfast, thinking that he had thus satisfied his oath. Otto Frising. Chron. 6. 15. Marian. Scot. ad ann. 908. Ditmarus Merseb. l. 1. at the beginning, wonders at this subtlety of the archbishop, and he had reason, since even the Romans would not have suffered a captive to escape without some mark of ignominy who had by such guile deceived an enemy, Gell. Noct. Att. 7. 18. Of such fraud Cicero says justly in his third book of offices, cap. 32. "He thought it a sufficient performance of his oath: but certainly he was mistaken: for cunning is so far from excusing a perjury, that it rather aggravates it, and makes it the more criminal. This therefore was no more than a foolish piece of craftiness, impudently pretending to pass for prudence: whereupon the senate took care to order, that my crafty gentleman should be sent back in fetters again to Hannibal."

#### Sect. CCX.

He who  
does an  
injury, is  
obliged to  
make re-  
paration.

We have sufficiently proved that it is unlawful to hurt any one by word or deed, nay even in thought. Now, since whosoever renders another more unhappy, injures him; but he renders one most unhappy, who, having injured him, does not repair the damage; the consequence is, that he who does a person any injury, is obliged to make reparation to him; and that he who refuses to do it, does a fresh injury, and may be truly said to hurt him again; and that if many persons have a share  
in

in the injury, the same rule ought to be observed with regard to making satisfaction and reparation, which we laid down concerning the imputation of an action in which several persons concur (§ 112 & seq.)\*.

\* Aristotle Ethic. ad Nicom. 5. 2. derives the obligation to make reparation from an involuntary contract: Pufendorff of the law of nature and nations, 3. 1. 2. deduces it from this consideration, that the law against doing damage would be in vain, unless the law-giver be likewise supposed to will that reparation should be made. But we infer this duty from the very idea of wrong or hurt. For he does not render us more imperfect or unhappy who robs us of any thing belonging to us, than he who having robbed us, does not make restitution or satisfaction. If therefore injury be unlawful, reparation or satisfaction must be duty.

## Sect. CCXI.

By *satisfaction* we here understand doing that <sup>What is</sup> which the law requires of one who has done an in- <sup>satisfac-</sup> jury. Now, every perfect law requires two things, <sup>tion?</sup>  
1. That the injury be repaired\*, because a person is hurt or wronged. 2. That the injurious person should suffer for having transgressed the law by doing an injury, because the legislator is leased by his disobedience or transgression. And for this reason satisfaction comprehends both reparation and punishment, (Grotius of the rights of war and peace, 2. 17. 22. & 120). The one doth not take off the other, because the guilt of the action for which punishment is inflicted, and the damage that is to be repaired, are conjunct in every delinquency. But of punishment in another place.

\* If damage be done by the action of no person, no person is obliged to satisfaction; for what happens solely by divine providence, cannot be imputed to any mortal (§ 106). And hence it follows, that when a proprietor suffers any damage in this way, he is obliged to bear it.



For what is imputable to no person we must suffer with patience.

## Sect. CCXII.

How it is  
to be  
made.

*Damage* done, is either of such a nature that every thing may be restored into its former state, or that this cannot be done. In the former case, the nature of the thing requires that every thing should be restored into its first state, and, at the same time, that the loss should be repaired which the injured person suffered by being deprived of the thing, and by the expences he was obliged to in order to recover it. In the latter case, the nature of the thing requires, that the person wronged should be indemnified by as equal a valuation of his loss as can be made; in which regard is to be had not only to the real value, but to the price of fancy or affection. Pufendorff hath illustrated this doctrine by examples in murder, in maiming, in wounding, in adultery, in rapes, in theft, and other crimes. Puf. of the law of nature and nations, B. 3. c. 1.

## REMARKS on this Chapter.

We shall have occasion afterwards to consider a little more fully with our Author, that natural equality of mankind upon which he founds our natural obligation to mutual love. Let me only observe here, that it is at least an improper way of speaking among moralists to say, "That all men are naturally equal in this respect, that antecedently to any deed or compact amongst them, no one hath power over another, but each is master of his own actions and abilities; and that none are subjected to others by nature." For we ought, as in physicks, so in morals, to reason from the real state, frame, constitution, or circumstances of things. And with regard to mankind, abstractly from all consideration of inequality occasioned by civil society, this is the true state of the case: 1. "That men are born naturally and necessarily subject to the power and will of their parents; or dependent upon them for their sustenance and education. The author of nature hath thus subjected us. 2. Men are made to acquire prudence by experience and culture; and therefore naturally and necessarily those of less experience and less prudence, are subjected to those of greater experience and prudence. There is naturally this dependence among mankind. Nay, 3. which is more, the Author of nature (as

Mr,

Mr. Harrington says in his *Oceana*) hath diffused a natural aristocracy over mankind, or a natural inequality with respect to the goods of the mind. And superiority in parts will always produce authority, and create dependence, or *hanging by the lips*, as the same author calls it. Such superiority and inferiority always did universally prevail over the world; and the dependence or subjection which this superiority and inferiority in parts or virtues creates, is natural. 4. Industry, to which, as the same excellent author says, *nature or God sells every thing*, acquires property; and every consequence of property made by industry is natural, or the intention of nature. But superiority in property purchased by industry, will make dependence, *hanging*, as that author calls it, *by the teeth*. Here is therefore another dependence or subjection amongst mankind, which is the natural and necessary result of our being left by nature each to his own industry." All these inequalities, or superiorities and dependencies, are natural to mankind, in consequence of our frame and condition of life. Now the only question with regard to these superiorities, and the right or power they give, must be either, 1. "Was it right, was it just and good to create mankind in such circumstances, that such inequalities must necessarily happen among them?" To which question, because it does not belong immediately to our present point, it is sufficient to answer, "That we cannot conceive mankind made for society, and the exercise of the social virtues without mutual dependence; and mutual dependence necessarily involves in its very idea inequalities, or superiorities and inferiorities: and that as we cannot conceive a better general law, than that the goods of the mind, as well as of the body, should be the purchase of application and industry; so the advantages arising from superiority in the goods of the mind, or from superiority in external purchases by ingenuity and industry, *i. e.* the authority the one gives, and the power the other gives, are natural and proper rewards of superior prudence, virtue and industry." 2. Or the question must mean, "Does it appear from our constitution, to be the intention of our Author, that man should exercise his natural or acquired parts and goods for the benefit of his kind, in a benevolent manner, or contrariwise?" To which I answer, "That as it plainly appears from our constitution to be the intention of our Author, that we should exercise our natural abilities to the best purpose, for our own advancement in the goods of the mind and of the body; and that we should improve in both, and reap many advantages by improvement in both, the chief of which is superiority over those who have not made equal advances either in internal or external goods: so it as plainly appears from our constitution, to be the will and intention of our Author, that we should love one another, act benevolently towards one another, and never exercise our power to do hurt, but on the contrary, always exercise it or increase it, in order to do good." If this appears to be the will of our Maker, from the consideration of

our constitution and condition of life, then to act and behave so is right; and to act or behave otherwise is wrong, in every sense of these words, *i. e.* it is contrary to the end of our make; and consequently repugnant to the will and intention of our Maker. Now, that we are made for benevolence; and are under obligation by the will of our Maker, to promote the good of others to the utmost of our power, will be fully proved, if it can be made out, that we are under obligation by the will of our Maker, appearing from our make and constitution, to forgive injuries, to do good even to our enemies, and in one word, to overcome evil by good. If the greater can be proved, the lesser involved in it, is certainly proved. And therefore, if it can be made appear, that by the law of nature, (in the sense we have defined these words) we are obliged to benevolence, even towards our enemies, all that our Author hath said about not injuring one by word or deed, or even by thought; and about the caution and tenderness that ought to be used in necessary self-defence, will be indisputable. Now, that it appears to be the will of our Author, from our make, that we should be benevolent even to the injurious and ungrateful, must be owned by any one who considers, that resentment in us is indignation against injustice or injury; is not, or cannot be otherwise excited in us; and therefore is not in the least a-kin to malice; and that as resentment is natural to us, so likewise is compassion. For if both these passions be in us, and we have Reason to guide them, as we plainly have, it is clear, that they must be intended to operate conjointly in us, or to mix together in their operations. Now what is resentment against injury, allayed or tempered by compassion, under the direction of reason, but such resentment as the suppression of injustice requires, moderated by tenderness to the unjust person? And what is compassion, allayed, mixed or moderated by resentment against injustice, but such tenderness towards the injurious person himself, as the preservation of justice, and consequently of social commerce and public good, permits? This argument is fully illustrated in my *Christian Philosophy*, p. 395, &c. And therefore I shall not here insist any longer upon it. The same thing may be proved, and hath been fully proved by moralists from other considerations. But I choose to reason in this manner, that we may see how reasonings about duties may proceed in the same manner as physical reasonings about the uses of parts in any bodily frame, or the final cause of any particular bodily whole. For if it be good reasoning to say, any member in a certain bodily organization is intended for such an end in that composition, it must be equally good reasoning to say, a moral constitution, in which there is a social and benevolent principle, compassion, and many public affections, and no hatred or aversion or resentment, but against injustice, together with reason capable of discerning public good, and delighting in it, is intended by its Author for the exercises of social affections; for justice; nay, for benevolence, and for commiserating even

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even the injurious, as far as public good admits that tenderness to take place.

Having mentioned the necessity of reasoning from the frame of mankind, and our condition, in order to infer the will of our Creator concerning our conduct, it may not be improper to add, That there is no difficulty in determining the will of our Creator, even with respect to our conduct towards inferior animals, if we state the case as it really is in fact, which is, "That such is the condition of mankind by the will of our Maker, that our happiness cannot at all be procured without employing certain inferior animals in labouring for us; nor even the happiness of the inferior animals themselves, in a great measure." For that being the case, tho' we can never have a right to employ inferior animals for our service by compact, they being incapable of it, yet we have a natural right to it, a right arising from the circumstances of things, as they are constituted by the Author of nature. But the right which arises from these circumstances, is not a right to torment them unnecessarily, because not only our happiness does not require that, but we really are framed by nature even to compassionate suffering brutes. But we shall have occasion afterwards to shew more fully, that a right may arise from the nature and circumstances of things, previous to compact or consent; or where there cannot be any compact or consent. Whoever would see the true meaning of the precept, *to love our neighbours as ourselves*, fully and clearly laid open, may consult Dr. Butler's sermon already quoted upon the love of our neighbour. That the precept, *Do as you would be done by*, is not peculiar to Christianity, but is a precept of the law of nature, and was known and inculcated by Confucius, Zoroaster, Socrates, and almost all ancient moralists, Pufendorff hath shewn, and Mr. Barbeyrac in his history of the moral science, prefixed to his notes on Pufendorff's system: so likewise our Author in the following chapter.

## CHAP. VIII.

*Concerning our imperfect duties towards others.*

### Sect. CCXIII.

WE think our obligation not to hurt any person, and the nature of injury have been sufficiently cleared and demonstrated. The next thing would be to explain with equal care our obligation to render to every one his own, and the nature of that duty (§ 175); were not the nature of our hypothetical duties such, that they could not be explained without

The order  
and con-  
nexion.



without having first considered the nature of our imperfect absolute duties. But this being the case, it is proper to begin with them ; and this premonition is sufficient to screen us against being charged with the crime reckoned so capital among the critics of this age (ne ὕστερον πρότερον) transgressing order designedly, and with evil intention.

## Sect. CCXIV.

The foundation and division of imperfect duties.

The source of all these duties is *love of humanity* or *beneficence* (§ 84), by which we cheerfully render him whom we love, not merely what we owe him by strict and perfect right, but whatever we think may conduce to his happiness. But because *humanity* commands us to be as good to others as we can be without detriment to ourselves ; and *beneficence* commands us to do good to others even with detriment to ourselves (§ 83); therefore our *imperfect duties* are of two kinds, and may be divided into those of *humanity*, or *unhurt utility*, and those of *beneficence* or *generosity*. Both are, for many reasons, or on the account of many wants, so necessary, that it is impossible for men to live agreeably or conveniently without them.

## Sect. CCXV.

Axioms concerning them.

Since there can be no other measure with respect to these duties but the love of ourselves, and therefore we are obliged to love others as ourselves, (§ 93); the consequence is, that whatever we would have others to do to us, we ought to do the same to them (§ 88); whence above, in premising a certain principle to which all our duties to others might be reduced, we laid down this rule, *Man is obliged to love man no less than himself, and not to do to any other what he would think inexcusable if done to himself*, (from which principle we have deduced our perfect duties); but, on the contrary, *to do to others what he would desire others to do to him* (§ 93). Now hence

hence we shall see that all our imperfect duties may be clearly inferred.

Sect. CCXVI.

First of all, none would have those things denied to him by others which they can render to him without hurting themselves; wherefore every one is obliged liberally to render such good offices to another; and consequently it is justly reckoned most inhuman for one, when it is in his power, not to assist another by his prudence, his counsel and aid; or not to do all in his power to save his neighbour's goods; not to direct a wanderer into the right road; to refuse running water to the thirsty; fire to the cold; shade to those who languish with excessive heat; or to exact any thing from another to his detriment, which can more easily, either without hurting ourselves or any other, be procured some other way. This kind of benignity is so small and trivial, that either by law or custom, the duties of this class have passed almost every where into duties of perfect obligation \*.

\* Thus, among the Athenians, it was reckoned a most atrocious crime not to direct one who wandered, into his right road. Hence that saying of Diphilus, "Don't you know that it is amongst the most execrable things, not to shew one his way." So by the Roman laws, one could by an action compel another, who was neither bound to him by any compact, nor by delinquency, to exhibit a thing. Latona in Ovid. *Metamorp.* 6. v. 349. appeals to custom,

*Quid prohibetis aquas? usus communis aquarum est.*

And Seneca, *Controv.* I. says, "It is barbarous not to stretch out our arms to one who is falling, this is the common right of mankind," (*commune jus*) that is, a common right or duty by the consent of all nations.

Sect. CCXVII.

It belongs to the same class of unhurt utility to communicate such things to others as we can, (such things as we can communicate to others without hurting ourselves.)

It extends to those things with which we abound.

(such is our abundance), spare them without any loss or hurt to ourselves; and to dispense among others things which would otherwise be lost and perish with us; insomuch, that they are very inhuman who suffer things to corrupt and spoil, who destroy in the fire, throw into the sea, or bury under ground things on purpose that no other may be the better for them\*.

\* This is also a very common sort of humanity, or another very low degree of it. As therefore, they are very cruel and inhuman, who refuse such good offices to others, so they are very unequal prizers of their actions, who expect very great thanks on account of any such good deeds, Terent. And. 2. 1. v. 31. says well, "It is not a mark of a liberal cast of mind, to desire thanks when one hath merited none." But who thinks the Calabrian did any considerable favour to his guest? to which Horace alludes, Ep. 1. 7. v. 14.

*Non quo more piris vesci Calaber jubet hospes.  
Tu mesecisti locupletem. Vescere sodes.  
Jam satis est. At tu quantumvis tolle. Benignus:  
Non invisa feres pueris munuscula parvis.  
Tam teneor dono, quam si dimittor onustus.  
Ut libet: hæc porcis hodie comedenda relinques.  
Prodigus & stultus donat, quæ spernit & odit.*

He is inhuman who can deny such things to those who stand in need of them: and he is more than inhuman, who when he gives them, appears to himself so wonderfully beneficent, that he would have a person think himself under perpetual and unpayable obligation to him on that account.

#### Sect. CCXVIII.

What if  
our huma-  
nity would  
be hurtful  
to our-  
selves?

But since we are bound to render such good offices to others from the love we are obliged to entertain towards others by the law of an infinitely good and merciful God (§ 215), and yet none is obliged to love another more than himself (§ 93); the consequence is, that we may deny these good offices to others, if we foresee the doing them may be detrimental to ourselves or our friends; which, since it

it may easily happen in a state of nature, where there is no common magistracy to protect and secure us, if we readily render these good offices even to our manifest enemies; there is therefore a plain reason why the good offices, even of *harmless use*, may be refused to an enemy in that state, as being ill disposed towards us; whereas in a civil state to deny them rashly to others under that pretext, would be very blameable.

\* Thus in war we deny our enemies the benefit of watering, and have even a right to corrupt provisions, that they may be of no advantage to our invaders. But all these things we have only a right to do as they are enemies. For otherwise, when they cannot hurt us, it is humanity that deserves praise to assist enemies, e. g. when they are in captivity or in sickness. And seeing in a civil state, an enemy cannot easily hurt us, whom at least the magistrate cannot reduce into order, he is most inhuman who refuses to an enemy, to a scelerate, the offices of innocent profit or unhurt utility, since he is an object of commiseration: "*If not the manners, yet the man, or if not the man, at least humanity,*" according to that excellent saying of Aristotle in Diogenes Laert. v. 21. For which reason, the inhumanity of the Athenians is scarcely excusable, "who had such an aversion to the accusers of Socrates, that they would neither lend them fire, nor so much as answer them when they spoke, nor bath in the same water which they had used, but would order their servant to pour it away as polluted and defiled, till impatient of such a miserable state of reproach, the wretches became their own executioners." Plutarch. de invid. & odio. p. 538.

# Sect. CCXIX.

Yea rather, since the love which is the source of Humanity all these duties, is due, not for the merits of others, <sup>is due to</sup> but on account of the equality of nature (§ 88), <sup>enemies.</sup> it is very evident, that even to enemies those things in which we abound, and which we can give them without any hurt to ourselves, ought to be given. And this humanity is so much the more splendid and



and noble, the less hope there is of our ever returning into great friendship with the enemy to whom such services are rendered\*.

\* We know this is inculcated upon Christians, Mat. v. 45. Luke vi. 35 ; and before their eyes the example of our heavenly Father is set, " Who maketh the sun to arise, and his rain to fall upon the just and the unjust." But that right reason, from the consideration of the equality of human nature, may discover this truth, is plain from hence, that Socrates set himself expressly to refute this vulgar maxim, " That we are to do good to our friends, and hurt to our enemies." So Themistius tells us, Orat. ad Valent. de bello victis. And what could have been wrote by one unacquainted with the sacred books, more excellent than this passage of Hierocles on the golden verses of Pythagoras, p. 69. " Whence it is justly said, that a good man hates no person, but is all love and benignity. For he loves the good, and does not regard the evil as his enemies. If he seeks out for a virtuous man, in order to associate with him, and loves an honest man above all things, yet in his love and goodness he imitates God himself, who hates no person, tho' he delights in the good, and embraces them with a peculiar affection."

#### Sect. CCXX.

The degrees of relation and affinity ought to be considered.

But because this love of humanity, from which these duties flow as their fountain or source, ought to have prudence for its director, which is that faculty by which things conducive to our own happiness and that of others is discerned; hence it is conspicuous, that regard ought to be had not only to persons, but to the necessities they labour under; and therefore in like circumstances, if it be not in our power to satisfy all, greater humanity is due to a good man than to a scelerate; more is owing to a friend than to an enemy; more to a kinsman and relative than to a stranger; and more to him who is in greater, than to him who is in less indigence of our assistance; and therefore so far the illustrious Leibnitz defines very justly, justice to be *the love of a wise man* \*.

\* Hence

\* Hence it is that Pythagoras has distinguished certain degrees of love in his golden verses, v. 4. &c. which are excellently interpreted by Hierocles, p. 46.

*Inde parentis honos sequitor : tum sanguinis ordo :  
Post alii sunt, virtus ut maxima, amici, &c.*

Sect. CCXXI.

That degree of love, which we called above *love* Our obligation to  
*of beneficence* (§ 214), is of a sublimer kind, be-  
cause it excites us to exert ourselves to the utmost, benefi-  
and even with detriment to ourselves, to promote cence.  
the good of others. Now, since what we would  
desire to be done to us by others we are obliged to  
do to them (§ 88), and many cases happen in which  
we ourselves would be very unhappy unless others  
should liberally bestow upon us what we want, and  
there is none who does not desire that others should  
so treat him; the consequence is, that we are obli-  
ged, in such cases, to supply others liberally with  
what they stand in need of, even with some detri-  
ment to ourselves\*.

\* We are said to give liberally, not what we lend, or  
give for hire, but what we bestow on others, without  
hope of restitution or retribution. If I give that I may re-  
ceive, such an action is a kind of contract. But if I give  
without any desire of, or eye to retribution or restitution,  
this is bounty or liberality. Seneca of benefits, c. 14.  
says, "I will entirely pass those whose good services are  
mercenary, which, when one does, he does not consider  
to whom, but for how much he is to do them, and which  
therefore terminate wholly in self. If one sells me corn  
when I cannot live without buying, I do not owe my life  
to him, Because I bought it. I do not consider so much  
the necessity of the thing to my life, as the gratuity of  
the deed, and in such a case I would not have got, had I  
not bought; and the merchant did not think of the service  
it would do me, but of his own profit: what I buy I do  
not owe." But tho' benefits ought not to be done with  
selfish views, yet none does good to another, without de-  
siring to bind the person he obliges to him by mutual love;  
and

and therefore the receiver by receiving tacitely obliges himself to mutual love.

## Sect. CCXXII.

What is  
meant by  
benefi-  
cent, and  
what by  
officious.

A *benefit* is a service rendered to one without hope of restitution or retribution; and therefore readiness to render such services we call *beneficence*; as readiness to do good offices, to lay on obligation of restoring or compensating by services to one's self is called *officiousness* by Sidon. Apollin. 23. v. 478. But tho' such services be not properly called *benefits*; yet they ought to be highly valued, and gratefully received, if they are greater than to admit of payment, or are rendered to us by one whom the nature of the good office did not oblige to do it \*.

\* This likewise is observed by Seneca, c. 15. "According to this way, one may say he owes nothing to his physician but his petty fee: nor to his preceptor, because he gave him money. But among us, both these are greatly revered and loved. To this it is answered, some things are of greater value than what is paid for them. Do you buy from your physician life and health, which are above all price; or from your instructor in useful arts and sciences, wisdom, and a well cultivated mind. Wherefore, to them is paid not the value of the thing, but of their labour and their attendance on us; they receive the reward, not of their merit, but of their profession." Afterwards he gives another reason why we owe gratitude to those who render us such good offices, cap. 16. "What then? why do I still owe something to my physician and preceptor, after I have given them a fee; why have I not then fully acquitted my self? because from being my physician and preceptor, they become my friend: and they oblige us not by their art, which they sell, but by their generous and friendly disposition."

## Sect. CCXXIII.

Benefi-  
cence  
ought to  
proceed

Since therefore beneficence is readiness to render such offices to others as we have reason to think will be serviceable to them (§ 222), every one must see





gent\*; upon unworthy persons preferably to men of merit; or, in fine, which are done contrary to that natural order founded in natural kindred and relation, of which above (§ 220).

\* For besides, that such benefits are snatched from the indigent, they are likewise not unfrequently baits to catch; and for that reason likewise they do not merit to be called benefits, Mat. v. 46, 47. Luke vi. 32. Besides, as to the more opulent, whatever benefit is rendered to them is neither grateful, nor has it the nature of a benefit. Thus we know Alexander the Great mocked at the pretended favour, when the Corinthians offered him the right of citizenship, tho' they boasted of having never made the compliment to any but Hercules and Alexander. Seneca of benefits, l. 13. But the memory of benefits formerly received from one yea: the customs of the state in which we live, and other reasons, may excuse such benefits: and therefore, at Rome none could blame this liberality of clients, because the right of patronage there established, required such liberality from the clients to their patrons, Dionys. Halic. 2. p. 84. Plutarch. Romul. p. 24. Polyb. Hist. 6. p. 459. Nor were the Persians blameable for bringing gifts to their king, since there was a law, "That every one should make presents to the king of Persia according to his ability." Ælian. var. hist. 1. 31.

#### Sect. CCXXV.

Benefits ought to be proportioned to the necessity and condition of persons. Besides, because benefits ought to be advantageous to persons (§ 222), it is evident from hence, that benefits ought to be suited to every one's condition and necessities; and therefore that those are not benefits which do no good to a person; much less such as do him great hurt, or at least are attended with considerable inconvenience to him\*.

\* He is not beneficent who gives a hungry person a jewel, to a thirsty person a fine garment, to a sick person a feast. *Bessus* did not surely deserve to be called a benefactor, who put chains of gold upon *Darius*, Curt. l. 5. cap. 12. Finally, that Roman, who being saved from proscription was carried about for a shew in a ludicrous manner, had reason thus to reproach his benefactor, and to say, "He owed

owed him no obligation for saving him, to make game and a show of him." Seneca of benefits, 2. 11.

Sect. CCXXVI.

Since that love of humanity and beneficence which binds to render good offices, extends even to enemies (§ 219), it is clear that those have a much better title to our love, who have done us all the kindneſſes they had in their power; and that they are the worſt of men, nay, more hard-hearted than the moſt ſavage brutes, who are not won to love by favours: they are ſo much the more unjuſt that it cannot be denied, that by accepting favours, we bind ourſelves to mutual love (§ 221).

The degrees of kindred and connexion are to be conſidered.

Sect. CCXXVII.

Love to benefactors is called *a grateful mind* or *gratitude*; wherefore, ſeeing one is obliged to love him from whom he hath received favours, the conſequence is, that every one is obliged to ſhew gratitude in every reſpect: yet this duty is imperfect, and therefore one cannot be compelled to perform it; an ungrateful perſon cannot be ſued for his ingratitude in human courts, unleſs the laws of the ſtate have expreſſly allowed ſuch an *action*. Some ſuch thing we have an example of in Xenophon's inſtitution of Cyrus, 1. 2. 7. p. 9. Edit. Oxon.

The obligation to gratitude.

\* Ingratitude is commonly diſtinguiſhed into *ſimple*, of which he is guilty who does not do good to his benefactor to his utmoſt power: and *pregnant*, of which he is guilty who injures his benefactor. The former, Pufendorff of the law of nature and nations, 3. 3. 17, ſays, a man cannot be ſued for at the civil bar; but mixed ingratitude he thinks not unworthy of civil puniſhment. But if we may ſay the truth, in this caſe the ungrateful perſon is not animadverted upon as ſuch, but as having done an injury; and he is liable to puniſhment who does an injury even to a perſon from whom he never received any favours. However, we readily grant, that an injury is much more atrocious, when it is joined with that baſeſt of vices, ingratitude.

titude. And therefore they are justly reckoned more wicked who are injurious to parents, instructors, patrons, than those who only wrong strangers, to whom they are under no special ties.

## Sect. CCXXVIII.

The rules  
relating  
to it.

Seeing gratitude is love to a benefactor (§ 227), it follows, that one is obliged to delight in the perfection and happiness of his benefactor; to commend and extol his beneficence by words, and to make suitable returns to his benefits; not always indeed the same, or equal, but to the utmost of his power; but if the ability be wanting, a grateful disposition is highly laudable.

## Sect. CCXXIX.

The obligation  
to the other.

In fine, since we are obliged, even to our own detriment, and without any hope of restitution or retribution, to do good to others (§ 221), the consequence is, that we ought much less to refuse favours to any one which he desires with the promise of restitution or retribution; and therefore every one is obliged to render to another what we called above *officiousness* (§ 222), provided this readiness to help others be not manifestly detrimental to ourselves (§ 93).

## REMARKS on this Chapter.

It is not improper to subjoin the few following observations upon our Author's reasoning in this chapter.

1. When duty is defined to be something enjoined by the divine will under a sanction, duties cannot be distinguished into *perfect* and *imperfect* in any other sense but this: "That some precepts of God give a right to all mankind to exact certain offices or duties from every one. But other precepts do not give any such right." Thus the precept of God not to hurt any one, but to render to every one his due, gives every one a right to exact his due, and to repel injuries. But the precept to be generous and bountiful, gives no man a right to exact acts of generosity and bounty, tho' it lays every man under an obligation to be generous and bountiful, to the utmost of his power. So that he who sins against the former is more criminal, or is guilty of

a higher crime than he who does not act conformably to the other. This is the only sense in which duties can be called, some *perfect*, and others *imperfect*, when duty is considered, with our Author, as an obligation arising from the divine will commanding or forbidding. For all such obligation is equally perfect, equally full. The distinction takes its rise from the consideration of what crimes do, and what crimes do not admit of a civil action, consistently with the good order of society; and it is brought from the civil law into the law of nature. But it would, in my opinion, be liable to less ambiguity in treating of the law of nature, instead of dividing duties into those of *perfect* and those of *imperfect* obligation, to divide them into greater or lesser duties, *i. e.* duties, the transgression of which is a greater crime, and duties the omission of which is a lesser crime: or, in other words, duties the performance of which may be lawfully exacted, nay compelled; and duties the performance of which cannot be compelled or even exacted. But our Author's terms mean the same thing, and cannot, if his definitions be attended to, create any ambiguity. However, we may see from his reasoning in this chapter, the necessity (as we observed in our preceeding remarks) of having recourse to internal obligation (as our Author calls it) or the intrinsic goodness and pravity of actions, in deducing and demonstrating human duties.

2. Since our Author's reasoning wholly turns upon the reasonableness of this maxim, "Do as you would be done by; and do not to another what you would not have done by any one to you in like circumstances." Perhaps some may have expected from him demonstration of the reasonableness of this maxim. Now this truth, which is indeed as self-evident as any axiom in any science, as for instance, "That two things equal to some common third thing, are equal to one another:" and which therefore, it is as hard to reason about as it is to demonstrate any axiom, for the very same reason, *viz.* that it does not in the nature of the thing require or stand in need of any reasoning to prove it: This truth may however be illustrated several ways, in order to make one feel its evidence and reasonableness. As with Pufendorff, law of nature, &c. B. 3. cap. 2. § 4. thus: "It as much implies a contradiction to determine differently in my own case and another's, when they are precisely parallel, as to make contrary judgments on things really the same. Since then every man is well acquainted with his own nature, and as well, at least, as to general inclinations, with the nature of other men, it follows, that he who concludes one way as to his own right, and another way as to the same right of his neighbour, is guilty of a contradiction in the plainest matter: an argument of a mind unsound in no ordinary degree. For no good reason can be given, why what I esteem just for myself, I should reckon unjust for another in the same circumstances. Those therefore are most properly sociable creatures who grant the same privilege to others which they desire should be allowed themselves;



and those, on the other hand, are most unfit for society, who imagining themselves a degree above vulgar mortals, would have a particular commission to do whatever they please." He observes in another place, B. 2. c. 3. § 13. "For the easy knowledge of what the law of nature dictates, *Hobbes himself commends the use of this rule* (De civ. c. 3. § 26). *when a man doubts whether what he is going to do to another be agreeable to the law of nature, let him suppose himself in the other's room.* For by this means, when self-love, and the other passions which weighed down one scale, are taken thence and put into the contrary scale, 'tis easy to guess which way the balance will turn." He afterwards shews us it was a precept of Confucius, and of Ynca Manco Capace, the founder of the Peruvian empire, as well as of our Saviour. "And in answer to Dr Sharrock, who is of opinion (De off. ch. 2. n. 2.) "That this rule is not universal, because if so, a judge must needs absolve the criminals left to his sentence, in as much as he would certainly spare his own life, were he in their place; and I must needs give a poor petitioner what sum soever he desires, because I should wish to be thus dealt with, if I was in his condition, &c." He replies, "The rule will still remain unshaken, if we observe, that not one scale only, but both are to be observed; or that I am not only to weigh and consider what is agreeable to me, but likewise what obligation or necessity lies on the other person, and what I can demand of him without injuring either of our duties." Thus Pufendorff reasons about this principle. But both he and our Author seem to consider it not as a fundamental or primary principle of the law of nature, but rather as a Corollary of that law, which obliges us, *To hold all men equal with ourselves.* But it cannot be so properly said to be a Corollary from that principle, as to be the principle itself in other words. For what is the meaning of this rule, *To hold all men equal with ourselves,* but to hold ourselves obliged to treat all men as we think they are obliged to treat us? The equality of mankind means equality of obligation common to all mankind, with regard to their conduct one towards another. Now, if any one seeks a proof of the reasonableness of holding all men equal in this sense, that it is reasonable for us to do to others what it is reasonable for them to do, or for us to expect they should do to us in like circumstances; if any one, I say, should seek a proof of this maxim, he really seeks a proof to shew, that like judgments ought to be given of like cases, *i. e.* that like cases are like cases; — and if, owning the truth of the proposition, he asks why it ought to be a rule of action, does he not ask a reason why a reasonable rule should be admitted as a reasonable rule; or why reason is reason, as we had occasion to observe in another remark?

3. But in the third place, that we are made for benevolence, because we have benevolent affections, and our principal happiness consists in the exercise of the social affections, or the social virtues;

virtues ; and our greatest and best security for all outward enjoyments, and for having and possessing the love of others, is by being benevolent;—that upon these and many other accounts, we are made and intended for benevolence, is as evident as that a clock is made to measure time, and in consequence of the same way of reasoning, viz. the way we reason about any constitution, or any final cause. We see what sad shifts they are reduced to, who would explain away into certain selfish subtle reflexions, all that has the appearance of social, kindly and generous in our frame ; and the perplexity and subtlety of such philosophy is the same argument against it, which is reckoned a very good one against complicated, perplexing hypotheses in natural philosophy, compared with more simple ones. (See some excellent observations on Hobbes's account of pity in Dr. Butler's excellent sermon on compassion, in a marginal note.) Who feels not that we are naturally disposed to benevolence, and what is the way in which our natural benevolence operates, and so points us to the proper exercises of it, while Cicero thus describes it : “ There is nothing, says he, so natural, and at the same time so illustrious, and of so great compass, as the conjunction and society of men, including a mutual communication of conveniencies, and general love for mankind. This dearnefs begins immediately upon one's birth, when the child is most affectionately beloved by the parent ; from the family, it by degrees steals abroad into affinities, friendships, neighbourhoods ; then amongst members of the same state ; and amongst states themselves, united in interests and confederacies ; and at length stretcheth itself to the whole human race. In the exercise of all these duties, we are farther disposed to observe what every man hath most need of, and what with our help he may, what without our help he cannot attain ; so that in some cases the tie of relation must yield to the point of time ; and some offices there are which we would rather pay to one relation than to another. Thus you ought sooner to help a neighbour with his harvest, than either brother or a familiar acquaintance ; but, on the other side, in a suit at law, you ought to defend your brother or your friend before your neighbour, &c.” Cicero de fin. l. 5. c. 23. Who feels not that this is the language of nature ; that thus our affections work ; that thus nature moves, prompts and points us to work ? And who can consider this natural tendency or course of our affections without perceiving by his reason, the advantage, the usefulness of this their natural tendency, with regard to ourselves and others equally ; and consequently the fitness of our taking care that they should always continue to operate according to this rule, according to this their natural tendency ? Or who does not feel that indeed this is the true account of human happiness, the happiness nature intended for us, our best and noblest happiness ?

*Happier as kinder! in what'er degree,  
And height of bliss but height of charity.*

Essay on Man, Ep. 4.

But if nature points out this course, this regular course of our affections; if it is felt to be the state of mind that alone affords true happiness; and if the general happiness of mankind plainly requires this direction and course of our affections: If, in one word, nature dictates it, and reason must approve of it in every view we can take of it, in what sense can it be denied to be our natural duty and the will of our Creator? And is it any wonder, that this rule of conduct hath been known to thinking men in all ages (as we cannot look into ancient authors without clearly seeing it hath been) since every heart dictates it to itself? 'This rule, "Do as you would be done by," is a rule of easy application, and it is universal, or it gives an easy, ready and clear solution in all cases. This appears from our Author's preceding and following applications of it to cases: for it is from it alone he reasons throughout all his deductions of duties. And that it is an equal, just, or reasonable rule, cannot be denied without asserting this absurdity, That what is true and just in one case, is not always and universally true and just in all similar cases. Again, that we are made to love mankind, and to live in the exercise of love and benevolence, is plain from our make and frame, and the intention of our Maker thereby discovered to us, according to all the received rules of reasoning about final causes. And therefore the principles upon which our Author builds, are in every view of them beyond all dispute. He now proceeds to enquiries of a more complex nature; but he still continues to argue from the same self-evident truths.

## CHAP. IX.

*Concerning our hypothetical duties towards others, and the original acquisition of dominion or property.*

### Sect. CCXXX.

The connection.

**W**HAT hath hitherto been explained, belongs partly to the *love of justice*, and partly to that which we call the *love of humanity and beneficence* (§ 84). From the latter we have deduced our imperfect duties in the preceding chapter; from the former our perfect ones are clearly deducible, which we said, consist in not injuring any person (and this

this we call an *absolute duty*), and in rendering to every one his due (which we call an *hypothetical duty*.) Now, having treated of *absolute duty* in the seventh chapter, we are now to consider our *hypothetical duties* with the same care and accuracy.

## Sect. CCXXXI.

That is properly called one's *own* which is in his *dominion*. By *dominion* we mean the right or faculty of excluding all others from the use of a thing\*. The actual detention of a thing, by which we exclude others from the use of it, is called *possession*. Again, we claim a right to ourselves either of excluding all others from the use of a thing, or of excluding all others, a few only excepted. In the former case, the thing is said to be in *property*; in the other case, it is said to be in *positive communion*, which is either *equal*, when all have an equal right to the common thing; or *unequal*, when one has more, or a greater right than another to that thing. And it again is either *perfect*, when every one has a perfect right to the common thing, or *imperfect*, when none hath a perfect right to it, as in the case of the soldiers of an army, to whom a certain reward in money is appointed by the prince. But if neither one, nor many have right or design to exclude from a thing not yet taken possession of, that thing is said to be in *negative communion*; and this communion alone is opposite to dominion, because in that case the thing is yet under the dominion of no person.

\* That dominion consists solely in the faculty of excluding others from the use of a thing, is obvious. For all the other effects of dominion, which are usually enumerated in the definition of it, may be separated from it, and yet one may remain master or owner of it, or have it in his dominion. Thus, e. g. we may observe, that the right or faculty of receiving all the profits of a thing by usufruct, is separated from propriety, while the dominion remains



entire: and it is known, that the faculty of disposing of a thing does not belong to minors, whom none however will deny to have dominion. Whence Seneca of benefits, 7. 12. says, "It is not a proof that a thing is not yours, that you cannot sell it, waste it, &c. For even that is yours, which is yours under certain limitations and conditions." In fine, we find the faculty taken away in certain countries from the owner, of vindicating to himself from a third possessor, a thing lent or deposited, where the law takes place, *Hand muss hand wahren*. Since therefore that only ought to enter into the definition of a thing, which so belongs to its essence that it cannot be absent, but the faculty of excluding others from the use of a thing being taken away, one immediately ceases to have any dominion, it cannot be doubted but this alone completes the definition of dominion. And this I take to be Arrian's definition, when he says, one who hath dominion is, "τὸν τῶν ὑπ' ἄλλων σπευδαζομένων ἢ ἐκκλινομένων ἐχοντα ἐξουσίαν, He who hath those things which others desire or fly from in his power."

## Sect. CCXXXII.

The right  
of man to  
created  
things.

Now since reason plainly discovers that men were created by God (127), it is manifest that our Creator must will that we exist. But he who wills the end, must be judged to will the means likewise. And therefore God must have willed that men should enjoy all things necessary to the preservation of their being which this earth produces. Further, God having given evident signs of his particular love to man, by having made him a most excellent creature, it cannot be doubted that he desires and delights in our perfection and happiness (§ 80). And by consequence he must will that we should enjoy even all things which can conduce to render our life more perfect, more satisfactory, more happy, provided we do not abuse them \* (§ 90).

\* It hath been called into question by some, whether man hath a right to the use of the brutes for the preservation of his life, which cannot be killed without their feeling pain? nay some have denied it, because they thought  
it

it an injury to the brutes, and not use but abuse of them, to kill them in order to feed upon them, especially since men may sustain their lives without such bloody revelling. Others add, that eating flesh is not wholesome, and renders men cruel and savage. This argument was first urged, we know, by Pythagoras, and afterwarrrds by Porphyry in his books *περὶ ἀποχῆς*. See Scheffer de Philosoph. Italica, cap. 14. But in the first place, this whole hypothesis about injury done to brutes, is founded on another erroneous opinion of the transmigration of souls, or of their having souls in common with us, and therefore a common right with us (*κοινὴ δικαιοσύνη ψυχῆς*) as it is called by Pythagoras in Diogenes Laertius, 8. 13. in explaining which Empidocles says in the same author,

*Nam, memini, fueram quondam puer, atque puella,  
Plantaque, & ignitus piscis, pernixque volucris.*

Add. Iamblichus's life of Pythagoras, 24. 108. and Porphyry's life of Pythagoras, p. 188. But it is false that there is any communion of right between us and the brutes (§ 90). And hence it is false, that an injury is done to the brutes. We are not therefore to abstain from things because we can be without them; for God not only wills that we exist, but that we live agreeably; and that use is not abuse, which is not contrary to the will of God. In fine, that unwholesomeness which they alledge, is not sufficiently proved, and most probably, it arises not from the moderate eating of flesh, but gluttony, and the abuse of created things, which we also condemn.

Sect. CCXXXIII.

Since God then hath given to man for his use <sup>Original</sup> and enjoyment all things conducive to render his <sup>ly</sup> all life agreeable (§ 232), he undoubtedly wills that <sup>things</sup> none should be excluded from any use of these <sup>were in a</sup> things; and therefore, according to the intention <sup>state of</sup> of God in the beginning of things, all things were <sup>negative</sup> in a state of negative communion, and so were in <sup>communi-</sup> the dominion of none \* (§ 231).

\* And thus not only the sacred records, Genesis i. 28, 29. but even the ancient poets describe the primæval state of mankind, which they have celebrated under the name of

of the golden age ; for then, as Virgil says, Georg. I, v. 125.

*Nulli subigebant arva coloni,  
Nec signare quidem, aut partiri limite campum  
Fas erat : in medium quærebant : ipsaque tellus  
Omnia liberius, nullo poscente, ferebat.*

They deny then, that there was at that time any divisions of land into different properties marked by boundaries, but assert that all things were in common, and so left to the use of all mankind, that none could be excluded from the use of them.

#### Sect. CCXXXIV.

But it was lawful to depart from this state, necessity so urging. Whatever God willed, he willed for the most wise reasons, and therefore it ought not to be altered by men but in case of great necessity. But since all the divine affirmative laws, such as this is, "That all things should be in common for the common use of all mankind," admit of exception in case of necessity (§ 159); and by necessity here is to be understood not only extreme necessity, but even such as makes it impossible to live conveniently and agreeably (§ 158 & 232); the consequence is, that men might, necessity so urging them, lawfully depart from that negative communion, and introduce dominion, which is opposite (§ 231) to negative communion.

#### Sect. CCXXXV.

What necessity urged men to introduce dominion. Now it is very evident, that if mankind had been confined to a small number, there would have been no need of any change with regard to the primeval negative community of things, because the fertility of nature would have sufficed to render the lives of all, if not agreeable, at least commodious or tolerable. But so soon as mankind was spread over the whole earth, and dispersed into innumerable families, some things began not to be sufficient to the uses of all, whereas other things continuing

continuing to be, because of their vast plenty, sufficient for all; necessity itself obliged men to introduce dominion with regard to the things which were not sufficient for the uses of all (§ 234), leaving those things only in their original negative community which are of inexhaustible use, or which are not requisite to the preservation and agreeableness of life\*.

\* And hence the lawyers have pronounced such things common by the law of nature, §. 1. *Inst. de rerum divis.* and that not, "as those public things which are the patrimony of a whole people, but as for those things which are originally a present of nature, and have never passed into the dominion of any person," as Neratius says, l. 14. pr. *D. de acqu. rerum dom.* The best and most beautiful of things, on account of their abundance, have always remained in the primeval negative communion. Hence Petronius Satyr. c. 6. says, "What is common, that is in its nature most excellent? The sun shines to all; the moon, attended with numberless stars, even guides the wild beasts to their food. What is more beautiful than water? and it is for common use." Neither does any one affect dominion over flies, mice, worms, and other things, which are either hurtful, or of no benefit to mankind.

Sect. CCXXXVI.

Dominion therefore was introduced, and negative community was abolished by necessity itself. But that this institution of mankind is injurious to none is manifest, because in negative communion none has a right to exclude another from the use of things (§ 231); and therefore it must be lawful to any one so to appropriate to himself any thing belonging to none, that he could not afterwards be forced by any person to yield him the use of it, but might detain it to himself, and set it aside for his own use\*.

\* For what none hath a right or intention to exclude me from the use of, that belongs to none. But a thing ceases



ceases to be none's, so soon as I apply it to my uses, and I have resolved to make use of my right granted to me by God (§ 232); because since he hurts and injures me, who endeavours to render me more imperfect or unhappy, (§ 178), he certainly injures me, who endeavours to deprive me of what I have taken to myself for the sake of my preservation, and living agreeably. The same happens in this case, that Arrian. dissert. Epict. 2. 4. says of the theatre, tho' it be positively common. "Is not the theatre common to all the citizens? But if one takes a place in it, turn him out of it if you can." And Seneca of benefits, 7. 12. "I have truly a place among the Equestrian order; but when I come into the theatre, if these places be full, I have a right to a place there, because I may sit there; and I have no right to a place there, because all the places are possessed by those with whom I have my right in common.

## Sect. CCXXXVII.

After that  
things are  
either po-  
sitively  
common  
or in pro-  
perty.

When men, obliged by necessity to it, have introduced dominion (§ 235), this must consist either in positive communion, or in property (§ 231). Wherefore, from the moment men depart from negative communion, all things are either positively common to many, or they begin to be proper to particulars; and community arises from the resolution of many to possess the same thing undivided in common, and to exclude all others from the use of it \*. But property takes its rise either from immediate occupancy and possession at first of a thing belonging to none, or from an after-deed, in consequence of a division or cession of things positively common.

\* This, no doubt, was done at first immediately, when families and tribes began to separate and disperse into different parts of the world. For then each family took possession of some region for itself in common, and without division for a while, till necessity urging, they divided the common possession, or by compact gave the liberty to each particular of occupying as much as he wanted. The antients mention several nations which in the beginning

possessed

possessed whole provinces in common without division, as the Aborigenes in Justin, 43. the Scythians and Getar. in Horace, Carm. 3. 4. the Germans in Tacitus, c. 26. the inhabitants of the island Lipara, the Panchæans and Vaccæans, Diodorus Siculus, Biblioth. v. 9 & 45.

Sect. CCXXXVIII.

Truly, if such were the happiness of mankind, Why it that all were equally virtuous, we would neither stand in need of dominion, nor of any compacts, because even those who had nothing in possession, would want nothing necessary to their comfortable subsistence. For in that case every man would love another as himself, and would cheerfully render to every one whatever he could reasonably desire to be done by others to him. And what use would there be for dominion among such friends having all in common? But since, in the present state of mankind, it cannot be expected that any multitude of men should be all such lovers of virtue, as to study the happiness of others as much as their own; hence it is evident, that positive communion is not suitable to the condition of mankind, as they now are, and therefore that they had very good and justifiable reasons for departing from it likewise \*.

\* Whoever mentions the being of such a communion any where among mankind, represents at the same time these men as extremely virtuous. This there is reason to say of the church of Jerusalem, Acts iv. 32. Nor did the poets think what they say of the community among mankind in the golden age could have been credited, if they had not also represented them as most studious of virtue; who, as Ovid says, Metam. i. v. 90.

*vindice nullo,*

*Sponte sua, sine lege, fidem rectumque colebant.*

The Scythians beyond the Mæotis, among whom Scymnus Chius tells us this community obtained, are said by him to have been τῆς ἀρετῆς, ἐντελήςατος, a most pious race. Iamblichus in his life of Pythagoras, § 167, tells us, that Pythagoras derived his community of things from justice

justice as its source : But virtue, justice and piety becoming rare and languid amongst men, that this communion could not take place or subsist, is manifest.

## Sect. CCXXXIX.

What are the original ways of acquiring dominion or property?

And hence also it is conspicuous how property was introduced, and what are the ways of acquiring property in a thing. For a thing is either still without dominion, or it is in the dominion of some person or persons. Now, in the former case we call the *original* ways of acquiring property with Grotius, those by which we acquire either the very substance of a thing yet belonging to none, or the accretions which may any how be added or accede to it. The first of which is called *occupancy*; the latter *accession*.

## Sect. CCXL.

What are the derivative ways?

But if a thing be already in any one's dominion, then it is either in the property of many, or of a particular (§ 231). In the first case, things in common are appropriated by *division* or *cession*; in the latter by *tradition*. Nor is there any other *derivative* way of acquiring dominion, which may not be most conveniently reduced to one or other of these sorts.

## Sect. CCXLI.

What occupancy is, and what a thing belonging to none?

*Occupancy* is taking possession of a thing belonging to none. A thing is said to belong to *none*, which none ever had a right to exclude others from the use of, or when the right of none to exclude others from it, is evidently certain, or when the right of excluding others from the use of it is abdicated by the possessor himself freely; in which last case, a thing is held *for derelinqvised*. But seeing none has a right to exclude others from the use of things which belong to none (§ 231), the consequence is, that things belonging to none, fall

to

to the share and right of the first occupants. Nor can this be understood to extend to things that are lost, carried off by fraud or force, cast over board in imminent danger of shipwreck, or taken away by brute animals; for in no sense are such things belonging to none, since they had owners, and these owners never abdicated their right and dominion\*.

\* Therefore the fisher Gripus philosophizes very soundly in Plautus, Rud. 4. 3. v. 32. concerning the fish he himself had caught in the sea, when he pleads they were his own, because none could justly exclude him from the use of them:

*Ecquem esse dices mari piscem meum?*  
*Quos quum capio, siquidem cepi, mei sunt: habeo pro meis:*  
*Nec manu adferuntur, neque illic partem quisquam postulat.*  
*In foro palam omnes vendo pro meis venalibus.*

But he gives a very bad reason, when he claims to himself a purse, which being lost by shipwreck, he had brought out of the sea in his net:

*In manu non est mea,*  
*Ubi demisi rete atque hamum, quidquid hæsit, extraho.*  
*Meum, quod rete atque hami nacti sunt, meum potissimum est.*

For to this Trachalio answers very right, v. 42.

*Quid ais, impudens,*  
*Ausus etiam, comparare vidulum cum piscibus?*  
*Eadem tandem res videtur?*

SECT. CCXLII.

Occupancy being taking possession of a thing be-Occupan-  
 longing to none (§ 241), and possession being de-cy is made  
 tention of a thing, from the use of which we have by mind  
 determined to exclude others (§ 231), it is plain nd body  
 that occupancy is made by mind and body at once.  
 and that intention alone is not sufficient to occupan-  
 cy, if another has a mind to use his right; nor  
 mere taking possession of a thing, without inten-  
 tion to exclude others from the use of it; but by  
 the tacite consent of mankind the declaration of  
 N intention



intention to appropriate a thing to one's self, joined with certain sensible signs, is held for occupancy \*.

\* Thus one is reckoned to have taken possession of a field, tho' he hath not walked round every spot of it, l. 3. § 1. l. 48. D. & l. 2. C. de acqu. vel amitt. possess. if he hath testified by some sign, such as cutting a branch from the tree, &c. to those present, his intention of appropriating that field to himself. But since these signs have their effect by tacite convention, they are not arbitrary; and therefore, he who threw his spear into a city deserted by its inhabitants, seems no more to be the occupant of that city than a hunter is of a wild beast, which, having flung his spear at it, he neither kills nor wounds. And hence may be decided the famous controversy between the people of Andros and Chalcis, about their right of occupancy with respect to the city of Acanthos, the former pleading that their spy seeing himself out-run by the Chalchidian spy, threw the spear which he had in his hand at the city gate, which stuck there; the other denying that cities could be occupied in this manner by throwing spears, and asserting their right to the city, because their spy had first entred into it. The story is related by Plutarch, Quæst. Græc. 30.

#### Sect. CCXLIII.

Moreover, since every thing may be occupied which is none's possession (§ 241), it will therefore be the same thing whether whole tracts of land unpossessed be occupied by many in lump, or whether particular parts be occupied by particular persons. The former, Grotius of the rights of war and peace, calls occupying *per universitatem*, by the whole; and the latter, occupying by parcels, (*per fundos*). But because he who takes possession of the whole, is judged to take possession of every part, hence it follows, that when any number of men, as a people in an united body, seize on some desolate tract of land by the whole, nothing becomes proper to any particular person, but all contained in that region, if particular parts be not taken

And either in the lump, or by parts.

taken possession of by particulars, belongs to the whole body, or to their sovereign \*.

\* Hence, in a tract of land, particulars may appropriate each to himself a particular part, and yet the whole territory may belong to the people, or the united body. Dio Chrysostom in Rhodiaca 31. "The territory is the state's, yet every possessor is master of his own portion."

Sect. CCXLIV.

None therefore can deny that *hunting, fishing, fowling*, are species of occupancy, not only in desert places unpossessed, but likewise in territories already occupied, since such is the abundance of wild beasts, fish, and winged creatures, that there is enough of them for all men (§ 235); yet, if there be any good or just reason \* for it, a people may, without injury, claim to themselves all such animals as are not under dominion (§ 243) or assign them to their sovereign as his *special right*; and that being done, it becomes contrary to the law of justice for any one rashly to arrogate to himself the right of hunting already acquired by another.

Whether wild beasts, fishes, birds, be things belonging to none.

\* Many such reasons, tho' not very proper ones, are accumulated by Pufendorff, of the law of nature, &c. 4. 6. 6. The one of greatest moment is, that wild beasts, fish and fowls, are not every where in such exhaustless abundance that the destruction of the whole species may not be feared, if the right of hunting be promiscuously given to all (§ 235), whence we may see why men are nowhere forbid to hunt and kill savage beasts, which are hurtful to mankind; nay, in some countries, rewards are offered to those who can, by bringing their heads, skins, or talons to the magistrate, prove he hath cleared the province from such pests.

Sect. CCXLV.

But wherever the right of hunting is promiscuous, reason plainly teaches that this right does not extend to tame animals, because they are in domi-

What animals may be hunted.

nion, nor to creatures tamed by the care of men, while one possesses them, or pursues them with an intention to recover them, or hath not by clear signs manifested his design to relinquish them \* : nay, that it does not extend to wild beasts inclosed in a park, to a fish-pond, a warren, a bee-hive, &c. but to those which, as *Caius* elegantly expresses it, l. 1. §. 1. *de adqu. dom. Terra, mari, cælo capiuntur*, are caught in the sea, air, or land.

\* Thus he will hardly be excusable, by a pretended right of hunting, who seizes a stag with bells about his neck, tho' wandering, if his owner be known : Nor is he to be defended, who keeps the master of a bee-hive, who is pursuing his bees, out of his court, that he may take possession of them himself ; tho' that seemed not unjust to the Roman lawyers, § 14. *Inst. de rerum divisione*. For tho' a master have the right to exclude others from the use of his own, yet he who enters our house to recover his own, does not use ours, but reclaims his own. And how can it be more just to keep a person out of our court who is pursuing his bees, than to drive a neighbour away from our house who comes to reclaim his hens which had flown into our court ? Wherefore that law of Plato was much more equal, *de legibus*, l. 8. " If any person follows his bees, and another by moving the air invites them into his ground, let him repair the damage."

#### Sect. CCXLVI.

Moreover, since besides the intention of excluding others from the use of a thing, corporal possession is required to occupancy (§ 242) ; the consequence is, that it is not enough to wound a wild beast, much less is it sufficient to have a mind to seize one that shall fall by its wound ; but it is requisite either that it be taken alive or dead by the hunters dogs, nets, or other instruments ; for if neither of these be done, any one has a right to seize and kill a creature, tho' wounded by another, because it is not yet made property \*.

\* But

When animals fall to the share of those who take them.

\* But there hath always been a great diversity of opinions about this matter; and hence it is, that the laws of countries are so different about it. See the different judgments of Trebatius and other Roman lawyers on this head, l. 5. D. de acqu. rerum dom. The Salic law, tit. 35. § 4. does not permit a wild beast that was so much as but raised by another's dogs to be intercepted by any one. The Langobard law, l. 1. tit. 22. § 4. & 6. adjudges to the seizer the shoulder with seven ribs, and the rest to the wounder. These, and other such like laws among the ancients are collected by Pufendorff of the law, &c. 4. 6. 10.

Sect. CCXLVII.

Another species of occupancy is called *occupancy* Whether occupancy by war be of this kind? by war, by which it is asserted, that persons, as well as things, taken in lawful war, become the taker's by the law of nations, l. 1. §. 1. D. de acqu. vel amitt. poss. But because occupancy can only take place in things possessed by none (§ 241), and things belonging to an enemy can only be by fiction \*, and free persons cannot so much as by fiction be deemed to belong to none; it follows, that occupancy by war does not belong neither to the original ways of acquiring, nor to occupancy, but must be derived from another source, even from the right of war itself.

\* Pufendorff, of the law of nature, &c. 4. 6. 14. thus explains this fiction: "By a state of war, as all other peaceful rights are interrupted, so dominion thus far loses its effect with regard to the adverse party, as that we are no longer under obligation to abstain from their possessions, than the rules of humanity and mercy advise us. In war, therefore, the goods of one party, in respect of the other, are rendered, as it were, void of dominion. Not that men do by the right of war cease to be proprietors of what was before their own; but because their propriety is no bar against the enemy's claim, who may seize and carry away all for his own use." But when things are rendered void of dominion, none has a right to exclude others from the use of them (§ 231); now, an enemy always preserves his right



of excluding an enemy from the use of his things ; nor does he any injury to any one, while he fights for his own with all his might. Who then will call such things, things void of dominion ? which if it be so, an enemy does not lose the things taken by his adverse party, because he has not the right of excluding an enemy, but for want of sufficient force to repel his enemy.

## Sect. CCXLVIII.

Of finding.

To occupancy *finding* is properly referred, since it consists in taking hold of a thing belonging to none ; and there is no doubt that a thing not yet possessed, or left by its possessor, falls to the finder, who first seizes it with an intention of making it his own ; wherefore the law of the Stagiritæ, Biblienses and Athenians, is contrary to the law of nature : “ ἀ μὴ ἔδωκε, μὴ ἀνέλεγε.” “ What you did not place, do not take up,” unless it be only understood of things lost ; Ælian. Hist. Var. 3. 45. 4. 1. Diog. Laert. 1. 57. Nor do they less err, who adjudge a thing found in common to the finder, and him who saw it taken up\*. But this right ought not to be extended to things which a people possess themselves of by the right of occupancy made by an united body in whole, or hath ceded to their sovereign as a special privilege, which may be lawfully done, as we have already observed (§ 243).

\* It was an ancient custom to demand in common what was found, and it was done by a *formula* called, *in commune*, or among the Greeks κοινὸς ἔμελλε, or κοινὸν πρὸς ἔμελλε, of which *formula* see Erasmus in adagiis : Many things are noted with relation to it by the learned upon Phædrus Fab. 5. 6. v. 3. See likewise Plautus Rudent. 4. 3. v. 72. But since things in the possession of none fall to the most early occupant (§ 241), and none has a right to exclude another from the use of such things (§ 231) ; and he, in fine, who only seized a thing with his eyes, but does not take hold of it, cannot be said to occupy (§ 242), it is evident that such a one has no right to demand any share of what is found, unless the civil laws of a country or custom permits it.

Sect.

## Sect. CCXLIX.

Nor is it less manifest that things belong to the finder which are abandoned by one of a sound mind, and master of his actions, with intention to abdicate them; and therefore scattered gifts, nay, even treasures, whose former owners cannot be certainly known, which are found by accident, unless the people or their sovereign claim them to themselves (§ 243). About which matter various laws of nations are quoted by Grotius of the rights of war and peace, 2. 8. 7. Pufendorff 6. 13. and Hertius in his notes upon these sections; Ev. Otto upon the institutes, § 29. inst. de rer. divis. Yet regard ought to be had to the proprietor of the ground, as having a right to all the profits of it of every sort\*. And therefore the emperor Hadrian, justly, and conformably to the laws of natural equity, adjudged one half of a thing found to the finder, and the other to the proprietor of the ground where it was found. Spartian in Hadriano, c. 18. §. 39. inst. de rerum divisione.

\* This is so true, that some nations thought the finder was to be preferred, as the Hebrews, Mat. xiii. 44. Selden de jure nat. & gent. See Hebr. vi. 4. the Syrians, the Greeks, and not a few among the Romans. (See Philostrat. vita Apoll. Tyan. 2. 39. de vita Sophist. 2. 2. Plautus Trinum. 1. 2. v. 141. l. 67. Dig. de rei vind. Where a part is granted to the finder, there seems to be no distinction between one hired to dig our ground, and one not hired. For tho' hired workers acquire to us by their hired labour, yet that does not seem a just reason for a distinction, if one hires himself not to search for treasures, but to dig a pit, or for any other like work. See Corn. van Bynkersh. observ. 2. 4.

## Sect. CCL.

Another original way of acquiring dominion is *What accession*, by which is understood the right of claim-*cession*, ing to ourselves whatever additions are made to a substance

substance belonging to us. Now, since substances belonging to us may be augmented either by natural growth, by our own industry, or by both conjointly; *Accession* is divided by the more accurate doctors of the law into *natural*, *industrious*, and *mixed* \*.

\* Thus to nature we owe the breed of animals, increments by rivers, a new cast up island, a forsaken channel: To our own industry, a new form, any thing added to what belongs to us, mixed or interwoven with it, joined or fastened to it, by lead or iron, or any other way; writing upon our paper, painting upon our cloath or board, &c. And partly to nature, and partly to industry, the fruits of harvest, these being owing conjointly to the goodness of the soil, and the clemency and favourableness of the weather, and to our own skill and labour. And therefore the first sort are called *natural* increments, the second *industrious* acquirements, and the third *mixed*. For what others add under the title of *fortuitous*, is more properly referred to the occupancy of things belonging to none.

#### Sect. CCLI.

The foundation of natural accession.

As to *natural* accession, what belongs to us either receives an addition we cannot certainly discover the origine and former owner of, or an addition by something known to belong to another. In the first case, since a thing, whose master cannot be certainly known, belongs to none (§ 241), there is no reason why such an increment may not go with the thing to which it hath acceded, and so be acquired to us. But in the other case, the thing hath an owner, who can by right exclude others from the use of it (§ 231); and therefore I have no more reason to think such a thing, however it be added to my goods, is acquired to me, than when a strong wind blows the linen of Titius, that were hung out in his garden, into my court \*.

\* No reason can be imagined why an owner, who is well known to be such, should lose the property of any thing

thing belonging to him while it subsists, if he hath neither abdicated his property, nor transferred it to another by any deed : And it would be cruel to take advantage of one's misfortune or calamity to deprive him of his right. If then one continues proprietor or master of a thing, which is added by whatsoever chance to our goods, he hath still the right of excluding any other from the use of that thing (§ 231) ; and therefore the dominion of it cannot be acquired against his will.

Sect. CCLII.

From the foregoing most evident principles, Of the (§ 251), we may also conclude, that *offspring*, or a *breed of* *birth*, the origine of which is not evident, (which *animals in* *particular.* often happens with regard to animals, and likewise to persons born out of lawful marriage) follows the dam or mother as an accessory increment, and that Ulpian, l. 24. D. de statu hominum, not without reason ascribes this effect to the law of nature. But this does not appear equal if both parents be certainly known \*, unless the male be kept at common expence for procreation, as a bull often is in common to many, or when the owner lets his bull or stallion to his neighbours for a certain hire.

\* Hence with regard to slaves, a division of children commonly takes place ; so that the first belongs to the mother's owner, and the next to the father's, and thus the offspring is shared by turns between the two masters. Of this I have discoursed in my Element. jur. Germ. l. 1. 30. where I have quoted examples of it among the Wisigoths and others, &c. From Goldast. rerum Alam. Tom. 2. charta 2. & Aventin. Annal. Boic. l. 7. 14, 23. p. 708.

Sect. CCLIII.

Nor is it less difficult to determine to whom a *new island*, that starts up in the sea, or in a river, *Of new islands,* belongs. For since it is impossible to discover with *whether* *call up, or* *artificial.* certainty to whom the different particles of earth belonged which have coalited into an island (§ 251), it follows, that an island must be adjudged an accession



sion to the sea or river\*; and therefore, if the sea or river belong to no person, the island likewise is without an owner, and must fall to the first occupant. But if, as often happens, either the sea or river belongs to a people or their sovereign (§ 243), that people or sovereign will have a just title to the island. In fine, since a thing which appertains to a known master, cannot be acquired by any person by accession (§ 251), an owner cannot lose his ground which is washed by a river or channel into a new island, as the Roman lawyers have acknowledged, l. 7. §. 4. l. 30. §. 2. D. de acqu. rer. dom.

\* There is therefore no reason why a new island should accede to the neighbouring fields upon each side, if it is formed in the middle, or to the one of them to which it is nearest; which however several lawyers have asserted, § 22. Inst. de rer. div. l. 7. § 3. l. 29. l. 30. § 1. D. de acqu. rer. dom. For the particles of earth forming the island come from grounds in a way that it cannot be certainly determined from what possessors they were carried off, and it is more probable that they were washed from more remote than from nearer fields. Besides, the river itself sometimes sweeps along with it, particles washed from the bottom, which at last collecting, form an island, according to Seneca, nat. quæst. 4. 9. This however was the opinion of Cassius Longinus, which his followers afterwards defended as by league and compact. Aggen Urbic. de limit. agr. p. 57. But the Proculiani, whose leader was Labeo, have exploded it in their way, Labeo apud Paullum, l. 65. § 4. D. de acqu. dom. “ Si id quod in publico innatum aut ædificatum est, publicum est: insula quoque, quæ in flumine publico nata est, publica esse debet.”

#### Sect. CCLIV.

So likewise by alluvion, and the force of a river.

The same is to be determined of *alluvion*, and ground separated by the force of a river. For as to the former, as nothing certain can be known concerning the origine of particles gradually annexed to our ground (§ 251), there is no doubt but what is added to our ground in that manner is accession to

to us; and what is thus added to a public way, or any public ground, accedes to the public\*. On the other hand, when the master of the ground carried off is known (§ 251), no change can be made in this case as to dominion, unless the master abdicates and leaves what is thus taken away from his possession; which in governments is commonly inferred from the not claiming it during a certain time fixed by law, §. 2. Inst. de rerum divis. l. 7. §. 2. D. de acqu. rerum dom.

\* And upon this foundation is built the distinction of lawyers and measurers of ground between *arcifinious grounds*, which are not bounded by any other but their natural limits, and such as are encompassed with artificial bounds, and parcelled out by a certain measure, as by the number of acres, l. 16. D. de acqu. Dom. l. 1. § 6. D. de flumin. of which difference between lands, see Isidor. orig. 11. 13. Auctores de limitib. p. 203. edit. Guil. Goessii. Jo. Fr. Gron. ad Grotium de jure belli & pacis, 2. 3. 16. 1. For what lies between artificially limited grounds and a river, it is either public, or the propriety of some private person. But in neither of these cases, does any thing accede to limited ground.

## Sect. CCLV.

In fine, as to a river's *changing its channel*, if the channel it deserts, as far as can be known, was in the dominion of no person, it cannot accede to those who possess the adjoining lands in proportion to their grounds, as the Roman lawyers thought, 7. §. 5. D. de acqu. rer. dom. But because the property of the river of which the channel is a part, is certainly known (§ 251), it will, as a part of the river, be his to whom the river belonged; as, for the same reason, the new channel, if again deserted, without doubt belongs no less to the first masters, than an overflown ground, after the water retires from it\*.

\* It

\* It is otherwise, if the inundation be perpetual, so that it becomes now sea where Troy stood, according to the saying; for then the ground is as it were extinct, and can be of no utility to any one. But of a non-entity, or what can be of no advantage to any person, there can be no dominion, no propriety (§ 235). Whence it follows, that their case is extremely hard, who are still obliged to pay tributes or taxes for lands long ago swallowed up by an inundation, unless, perhaps, they may have deserved it by their negligence in restoring the dikes, tho' even a penalty in that case seems unreasonable and cruel: For why ought things to be burdened with taxes, or imposts to be exacted, when the propriety, the usufruct, the possession or passage are lost? l. 23. de quibus modis usufr. amit. l. 3. § 17. l. 30. § 3. D. de acqu. possess. l. 1. § 9. D. de itin. actuque priv.

## Sect. CCLVI.

Of accession by industry, first axiom.

Let us now consider *industrious* and *mixed* accession, concerning which some lawyers have treated with so much subtlety. And we think, if the things be joined by mutual consent, it cannot be doubted but each is master according to his proportion, and in this case there is a positive community introduced (§ 231). But we are here speaking of an accession made without the other's consent. Now, seeing a master has a right to exclude all from the use of what is his (§ 231), he has a right certainly to hinder any thing from being joined to what is his against his will. Wherefore, since what is added to any thing of ours, either renders it useless, or at least worse, or renders it more valuable and better, because he who renders our goods worse hurts us (§ 178); the consequence is, that he who has rendered our goods either useless or worse by any industrial accession, is obliged, taking the spoilt goods, to repair our damage; and if he did it by deceit, and with evil intention, he is likewise liable to punishment (§ 211).

Sect.

## Sect. CCLVII.

But if our goods are rendered better and more valuable by any artificial accession, then there is a great difference when the two things can be separated without any considerable loss, and when they cannot. In the former case, since the master of each part hath a right to exclude all others from the use of what belongs to him (§ 231); but that cannot now be done otherwise than by separating the two things; the consequence is, that in this case the things are to be immediately separated, and to each is to be restored his own part. But, in the other case, the joined things ought to be adjudged to one or other of the two, the other being condemned to pay the value of what is not his to the owner who is thus deprived of it\*; and if there be any knavery in the matter, punishment is deserved (§ 211).

\* For whosoever intercepts any thing from another, he stands in need of for his sustenance or agreeable living, injures him (§ 190); but he who injures one is bound to satisfaction (§ 210), which, when what is done cannot be undone, consists in making a just estimation of the thing, and paying it (§ 212); wherefore, he who desires to intercept any thing belonging to another person, and to appropriate it to himself, is obliged to pay its just value. Whence this law appears to be very equitable, "That none ought to become richer at the expence or detriment of another."

## Sect. CCLVIII.

But since in the last case, the joined things are to be adjudged to some one of the two, there (§ 257) ought to be some good reason why one should be preferred (§ 177): because therefore, there can be no other besides the superior excellence of one of the two things, which is oftner measured by rarity and affection than by utility; hence we infer, that the rule which adjudges *the accessory to its principal*, is not always equal. Justinian himself,

Second  
and third  
axiom.

A fourth  
axiom,  
&c.



self, and before him Caius, acknowledged the absurdity of it in the case of a picture, § 34. In. de rer. divis. l. 9. § 2. D. de acqu. dom. And therefore the joined things ought to be assigned to him whose part is of the greatest price\*, either on account of its rarity, or of his affection, labour, care and keeping; and the other ought to be condemned to make an equivalent to him for what was his, if he insists upon it, and does not rather choose to make a present of it to the other.

\* The ancient lawyers did not found in this matter upon any certain natural reason, and therefore divided into different opinions, as is observed by Jo. Barbeyrac upon Pufendorff, of the duties of a man and a citizen. The first who attempted to reduce this affair into order, and to distinguish things that had been confounded together, was Christi. Thomafius dissertat. singulari, de pretio adfectionis in res fungibiles non cadente, Hal. 1701, where he has by the same principles most accurately examined the doctrines of the Roman lawyers concerning accession by industry.

#### Sect. CCLIX.

What is  
just with  
respect to  
specifica-  
tion.

Hence we may plainly see what ought to be determined in the case of *specification*, by which a new form is given to materials belonging to another. For since very frequently all the affection or value is put upon the form on account of the workmanship or art, and none at all is set upon the substance (§ 258), a new species will rightly be adjudged to him who formed it\*; but so as that he shall be obliged to make a just equivalent for the price or value of the materials, and shall be liable to punishment, if there be any fraud or knavery in the case (§ 256). So Thomafius, in the dissertation above quoted, § 43. & seq. Yet for the same reason above mentioned, the owner of the substance ought to be preferred, if it be rarer and of greater value than the form added to it by another's labour and art: *e. g.* if one shall make a statue or vase of Corinthian

rinthian brass, amber, or any precious matter belonging to another, the owner of the materials shall have it, but he shall be obliged to pay for the workmanship, provided the fashioner acted *bona fide*, i. e. without any fraudulent design.

\* There is no solidity in the distinction by which Justinian proposed to clear this intricate question, § 25. Inst. de rer. divis. whether the new form could be reduced without hurting the substance, or not? For there is no good reason why, in the former case, the owner of the materials, and in the latter the fashioner should be preferred, especially, seeing the matter without the fashion is frequently of very little value. (See Pufend. of the law of nature and nations, 4. 7. 10.) Yea sometimes the fashion, is of a hundred times more value than the materials. Now who will say in this case, that the form belongs to the owner of the substance, because the fashion may be destroyed, and the substance reduced to its first state? But since the value of the planks can be more easily paid than the value of the ship made of them, who therefore will adjudge the ship to the owner of the planks, because the ship can be taken down. If an old ship be repaired with another's timber, Julian follows our principle in this case, l. 61. D. de rei vind. and yet without doubt the materials can also be reduced to their former state, even when a new ship is built with planks belonging to another, l. 26. pr. D. de adqu. rer. dom.

#### Sect. CCLX.

Again, *adjunction* is no inconsiderable species of <sup>what</sup> industrious accession, when something belonging to <sup>with re-</sup> another is added to our goods by inclusion, by <sup>fold-</sup> <sup>gord to</sup> <sup>adjuncti-</sup> <sup>on, inclu-</sup> <sup>sion, &c.</sup> <sup>ing</sup> <sup>with</sup> <sup>lead,</sup> <sup>by</sup> <sup>nailing</sup> <sup>or</sup> <sup>iron-work,</sup> <sup>by</sup> <sup>writing,</sup> <sup>painting,</sup> <sup>&c.</sup> Now since inclosing is often of such a kind, that the things joined may be severed without any great loss, in such cases the things may be separated, and every one's own restored to him, and this is equal (§ 257): There is certainly no reason why the gold may not be restored to whom it belongs, when another's precious stone is set in it, and the gem to its owner. And the same holds with regard to foldering, fastening, interweaving,

weaving, and other such like cases, when the things can be separated without any considerable loss : Otherwise the joiner ought to be preferred, because the substance rarely admits of any price of affection \* (§ 258).

\* Besides, it would not seldom be an inconvenience to the owner of the materials, if he were obliged to retain them with the accession, and to pay the price of the thing adjoined, especially if it be what he cannot use on account of his condition, age, or other circumstances, *e. g.* if one should add to the vestment of a plebeian a *laticlave*, or much gold lace, the materials are in such a case, as to use, rendered truly worse to him, or quite useless. But whoever renders our materials worse or useless to us, is obliged to take the spoilt goods, and to repair our damage ; and if there be any fraud or knavery in the case, he is also liable to punishment (§ 256).

#### Sect. CCLXI.

What as  
to build-  
ing upon,  
&c.

If any one builds upon his own ground with the materials of another person, when there was no knavery in the design, and the building is of timber, there is no reason why, if the mistake be very soon discovered, the building may not be taken down, and the timber be restored to its proprietor \* (§ 257). But if the building be of stone, or if the timber would afterwards be useless to its owner, it will then be most equal to say, that the builder should have the property of the building, but be obliged to make a just satisfaction, for the materials, and be moreover liable to punishment, if there is any knavery in the case (257 and 258). If one build with his own materials upon another's ground, if the building can be taken down without any considerable loss, it ought to be done (§ 257) ; or what admits of a price of affection ought to be adjudged to the proprietor of the ground (§ 258), unless the building be plainly of no use to the lord of the ground, in which case the

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yers  
23.

the builder retaining the building to himself, is bound to pay the worth of the ground, and if there be any bad intention, he is moreover liable to punishment.

\* The reason why the *Decemviri* forbid timber edifices to be pulled down was, that cities might not be molested with ruins, l. 6. D. ad exhib. l. 7. § 10. de adqu. rerum dom. l. 1. D. de tigno juncto, and is merely civil, and has nothing in natural reason to support it. Hence many nations, where the houses were not built of stone but of timber, not only allowed but commanded by their laws buildings in this and like cases to be pulled down. See jus. prov. Sax. 2. 53. and what I have observed on this subject in my Elements jurif. Germ. 2. 3. 66. To which I now add the Lombard Constitution, l. 27. 1.

Sect. CCLXII.

There is less difficulty as to writing and painting. For since those things upon which another sets no value, are to be left to him who puts a value upon them (§ 258), and the value for the most part falls upon the writing and painting, and never upon the cloth or paper, the paper ought to yield to the writing, and the board or cloth to the painting, if the writer and painter will make satisfaction for them \*. And if the painting and writing have no value, as if one should scribe a little upon my paper, or dawb my board with fooleries, even in this case, the writer and painter ought to take the thing, and pay the value of the paper or board by the first axiom (§ 256).

\* It is strange that the Roman Lawyers, some of whom agreed to this principle, in the case of painting, should not admit it in the case of writing. As if it were more tolerable that the writing of a learned man should become an accession to a trifle of paper, than that the painting of Appelles or Parrhasius should become an accession to a contemptible piece of board. Besides, when the Roman lawyers compare writing with building upon one's ground, § 23. Inst. de rerum divis. l. 9. D. de adqu. dom. may it



not very reasonably be asked, why there should not be room for the same comparison with regard to painting? And what likeness can there be imagined between the ground upon which one builds, and the paper upon which one writes? The one we seldom or never can want without suffering very great loss: The other we do not value, provided we receive satisfaction for it, or as much paper of the same goodness. This is a poetical resemblance taken from the action of writing, upon which account the Latin writers used the phrase *exarare literas* for *scribere*. But such a similitude of things is not sufficient to found the same decision about them in law and equity.

## Sect. CCLXIII.

With re-  
spect to  
confusion  
and mix-  
ture.

Further, as to the *mingling* of liquids, or the *commixture* of dry substances, tho' the Roman lawyers have treated of a difference with much subtlety, l. 23. §. 5. D. de rei vind. yet there is none. For if things be mixed or confounded by the mutual consent of parties, the mixed substance is common, and ought to be divided between them proportionably to the quantity and quality of the ingredients (§ 256). If it be done against the will of one of them, then the substance, which is of no use, ought to be adjudged to the mixer, and he ought to make satisfaction, and to undergo a penalty if he had any bad or fraudulent intention, (§ 256); but yet, if one would rather have a part of the substance than the price of his materials, there is no doubt that he now approves the mixture which he at first opposed, and therefore a proportionable part of the common matter cannot be refused to him\*.

\* For subsequent approbation is consent, tho' it be less imputable than command and previous consent (§ 112): Wherefore, if by an accidental confusion of our metals, a matter of great value should be produced, like the Corinthian brass by the burning of Corinth; there can be no reason why we may not claim each a share of the common matter: for since it would have been common if it had

had been made by our consent (§ 256), and approbation is adjudged consent (§ 112), there is no reason why it should not become common by approbation, and every one have his proportionable share.

Sect. CCLXIV.

To conclude; by the same principles may we About determine concerning *sowing* and *planting*, which mixed ac-  
were above referred to the *class of mixed accessions*, cessions,  
(§ 250). For trees and plants, before they have sowing  
taken root, may be severed from the soil without and  
any great loss, and so be restored to their owners planting.  
(§ 257); but when they have taken root, as like-  
wise seed sown, seeing they cannot easily be separat-  
ed from the soil, and yet do not admit of a price  
of fancy or affection, they are acquired to the pro-  
prietor of the soil, he making satisfaction for the  
value of the trees or seed, and the expences of cul-  
ture (§ 258), unless, in this last case, the proprie-  
tor of the soil is willing to leave the crop to the  
sower for a reasonable consideration \*.

\* For which the lord of the soil may have just and proper reasons: As for instance, if the ground was ill-dressed or ill-sown, so that he has no ground to expect a good crop: Then the crop would be of little use to him, and the first axiom is in his favour (§ 256).

Sect. CCLXV.

As to a *tree* in our neighbourhood, he who About the  
plants it, consents that a part of its branches should fruits of  
hang over into the court of his neighbour; and the trees in  
neighbour, who has a right to exclude others from one's  
his court, by not doing it, also consents to it; neigh-  
wherefore the accession being made with the mu- bourhood.  
tual consent of both parties, the tree is common,  
(§ 256); and for this reason, while it stands in  
the confines, it is common in whole, and when it is  
pulled up, it is to be divided in common: so that  
in the former case the leaves and fruits are in com-

mon ; and in the latter case the timber is to be divided between the two neighbours in proportion \*.

\* This simplicity is preferred by our ancestors to the subtleties of the Roman law, concerning the nourishment attracted by the roots of trees, which gradually changes their substance, l. 26. § 2. D. de acqu. dom. For the nations of a German extraction considered the branches of trees more than their roots, as we have shewn in our Elem. of the German law, 2. 3. 69.

#### REMARKS on this chapter.

The questions in this chapter, however intricate they may appear at first sight, or as they are commonly treated by the doctors of law, are in themselves very simple and easy. Nothing more is necessary than to state them clearly, or in the simplest terms, in order to discover on which side the least hurt lies. Our Author's divisions and definitions are exceeding distinct: And all his determinations turn upon this simple principle he had in the preceeding chapters fully cleared, "That no injury ought to be done ; and injuries that are done ought to be repaired." He sets out in this chapter, as good order and method requires, by inquiring into the nature and origine of dominion and property. And tho' I think he hath handled this curious question, which hath been so sadly perplexed by many moralists, better than most others, yet something seems to me still wanting to compleat his way of reasoning about it. Our Locke, in his treatise on Government, book 2. c. 4. as Mr. Barbeyrac hath observed in his notes on Pufendorff of the law of nature and nations, b. 4. c. 4. hath treated this question with much more perspicuity and accuracy than either Grotius or Pufendorff. The book being in every one's hands, I shall not so much as attempt to abridge what he says on the head. The substance of it is contained in this short sentence of Quintilian, Declam. 13. "Quod omnibus nascitur, industriæ præmium est." "What is common to all by nature, is the purchase, the reward of industry, and is justly appropriated by it." Let us hear how our Harrington expresses himself upon this subject (the original of property) in his art of law-giving, chapter 1. at the beginning in his works, p. 387 "The heavens, says David, even the heaven of heavens are the Lords, but the earth has he given to the children of men : yet says God to the father of these children, in the sweat of thy face shalt thou eat thy bread, *Dii laborantibus sua munera vendunt*. This donation of the earth to man, comes to a kind of selling it for industry, a treasure which seems to purchase of God himself. From the different kinds and successes of this industry, whether in arms, or in other exercises of the mind or body, derives the natural equity of dominion or property ; and from the legal establishment

establishment or distribuion of this property (be it more or less approaching towards the natural equity of the same) proceeds all government." Now, allow me to make some very important observations upon this principle, which, as simple as it appears, involves in it many truths of the last importance, in philosophy, morality and politics. 1. That man is made to purchase every thing by industry, and industry only, every good, internal or external, of the body or mind, is a fact too evident to be called into question. This hath been long ago observed. When Mr. Harrington says, "Nature or God sells all his gifts to industry," he literally translates an ancient Greek proverb: *Θεὸς τὰ γὰρ τοῖς πονοῖς πωλεῖναι*, (see Erasmi adagia) as did the Latins in their many proverbial sentences to the same purpose, "Labor omnia vincit:" "Omnia industriæ cedunt," &c. See Virg. Georg. 1. v. 121, &c. 2. But as ancient and evident as this observation is, yet none of the ancient philosophers ever had recourse to it in the celebrated question, "Unde bonis mala, &c." i. e. about the promiscuous distribution of the goods of fortune (as they are commonly called) in this life; tho' this fact contains a solid refutation of that objection against providence, and from it alone can a true answer be brought to it. Mr. Pope in his *Essay on Man*, ep. 4. v. 141, &c. (as I have taken notice in my *Principles of Moral Philosophy*, part 1. chap. 1. and chap. 9. and part 2. chap. 3.) is the first who hath given the true resolution of this seeming difficulty from this principle, that according to our constitution, and the frame of things, the distribution of goods internal or external, is not promiscuous; but every purchase is the reward of industry. If we own a blind fortuitous dispensation of goods, and much more, if we own a malignant dispensation of them, or a dispensation of them more in favour of vice than of virtue, we deny a providence, or assert bad administration. There is no possibility of reconciling bad government with wisdom and goodness; or irregularity and disorder with wisdom and good intelligent design, by any future reparation. But the alledgeance is false; for in fact, the universe is governed by excellent general laws, among which this is one, "That industry shall be the purchaser of goods, and shall be generally successful." And that being the fact, the objection which supposes promiscuous, fortuitous, or bad government, is founded upon a falsity in fact. In fine, there is no way of proving providence, but by proving good government by good general laws; and where all is brought about according to good general laws, nothing is fortuitous, promiscuous or bad. And not to mention any of the other general laws in the government of the world, constituting the order according to which effects are brought about; and consequently the means for obtaining ends to intelligent active creatures; what better general law can we conceive with regard to intelligent active beings, than the general law of industry; or can we indeed conceive intelligent agency and dominion without such a law? Are not the two



inseparable, or rather involved in one another? But where that law obtains, there is no dispensation or distribution properly speaking; for industry is the sole general purchaser, in consequence or means uniformly operative towards ends. But having elsewhere fully insisted upon this law of industry, in order to vindicate the ways of God to man; let me observe, 3. in the third place, Mr. Harrington is the first who hath taken notice, or at least fully cleared up the consequences of this general law of industry with respect to politics, that is, with respect to the natural procreation of government, and the natural source of changes in government. Every thing hangs beautifully and usefully together in nature. There must be manifold mutual dependencies among beings made for society, and for the exercise of benevolence, love and friendship; that is, there must be various superiorities and inferiorities; for all is giving and receiving. But dependence, which supposes in its notion superiority and inferiority, must either be dependence in respect of internal, or in respect of external goods; the former of which Mr. Harrington calls *hanging on the lips*, and the other *hanging on the teeth*. Now the law of industry obtaining amongst men placed in various circumstances (and all cannot be placed in the same) will naturally produce these dependencies. A greater share of wisdom and virtue will naturally procreate authority, and the dependence on the lips. [This perhaps is the meaning of that ancient saying of Democritus mentioned by Stobæus, *serm. 27. "φύσει τὸ ἀρχεῖν δίκαιον τῷ κρείσσονι."* "Authority falls naturally to the share of the better, more excellent or superior."] And a greater share of external goods, or of property, naturally begets power, and the other dependence on the teeth. And hence it will and must always hold as a general law, That dominion will follow property, or that changes in property will beget certain proportional changes in government: and this consequently is the natural seed, principle or cause of procreation and vicissitude in government, as Mr. Harrington has demonstrated fully and accurately. I only mention these things here, because we shall have occasion to have recourse to them afterwards, when our Author comes to treat of government. The conclusion that more properly belongs to our present purpose is, 4. in the fourth place, It must necessarily have happened soon after the world was peopled, that all was, must have been appropriated by possession and industry: and therefore, at present, our business is to determine how, things being divided and appropriated, the duties of mankind stand. But it is clear, 1. in the first place, that suppose the world just beginning to be peopled, or suppose a considerable number of men just cast ashore upon a desert country (setting aside all compacts and regulations previously agreed upon) every one will have a right to the purchase of his industry; to the fruits of his labour; to improve his mind, and to all the natural benefits and rewards of that culture; and to the fruits of his skill, ingenuity and labour, to get

riches,

riches, with all the natural benefits and rewards of them ; but yet every one will be obliged, in consequence of what hath been already said of the law of love and benevolence, to exercise his abilities, and to use his purchases in a benevolent way, or with tender regard to others. This must be the case with regard to our right and obligation, previous to all compacts, conventions or regulations. 2. And where lands are already appropriated, and civil government settled, this is a true principle still, that one has a right to all the purchases of his industry, with respect either to external or internal riches, (if I may so speak) consistent with the law of benevolence, or the law of not injuring any one, but of doing all the good to every one in our power ; and hence it is, that every one in formed society hath a right to his purchases by the arts of manufacture and commerce, &c. Tho' a state, to fix the balance of dominion or of government, may fix the balance of property in land, and likewise make regulations about money, (as in the Commonwealths of Israel, Lacedemon, Athens, Rome, Venice, &c. in different manners) in consequence of the natural connexion between the balance of property and the balance of dominion : Tho' this may be done in forming or mending government by consent, yet even where an Agrarian law obtains, this principle must hold true and be untouched, that every one has a right to the purchases of his industry, in the sense aboved limited : For otherwise, there would be no encouragement to industry, nay, all must run into endless disorder and confusion. 3. And therefore universally, whether in a state of nature, or in constituted civil governments, this must be a just, a necessary principle, that industry gives a right to its purchases, and all the benefits and rewards attending them. 4. And therefore, fourthly, it can never be true, that a person may not, as far as is consistent with benevolence, endeavour to have both power and authority. If we consider what would be the consequences of denying this principle, that is, of setting any other bounds to the purchases of industry but what the law of benevolence sets, we will soon see that this must be universally true. And if we attend to our frame, and reason from it to final causes, as we do in other cases, it is plain, that there is in our constitution naturally, together with a principle of benevolence, and a sense of public good, a love of power (of *principatus*, as Cicero calls it in the beginning of his first book of offices) without which our benevolence would not produce magnanimity and greatness of mind, as that desire of power would, without benevolence and a sense of public good, produce a tyrannical, overbearing and arrogant temper. Some moralists do not seem to attend to this noble principle in our nature, the source of all the great virtues, while others ascribe too much to it (as Hobbes), and consider it as the only principle in our nature, without taking our benevolence and sense of public good, which are as natural to us, into the account, (See what I have said on this head in my *Principles of Moral*

*Philosophy.*) But both principles belong to our constitution ; and therefore our virtue consists in benevolent desire of, and endeavour to have authority and power in order to do good. 5. It is in consequence of this principle, that it is lawful to have dependents or servants, and that it is lawful to endeavour to raise ourselves, or to exert ourselves to encrease our power and authority. The great, sweet, the natural reward of superiority in parts and of riches, and consequently the great spur to industry, is the dependence upon us it procreates and spreads. And why should this noble ambition acknowledge any other bounds but what benevolence sets to it : Any other limits but what the Author of nature intended should be set to it, or rather actually sets to it, by making the exercises of benevolence so agreeable to us, as that no other enjoyments are equal to them in the pleasure they afford, whether in immediate exercise, or upon after reflection ; and in making mankind so dependent every one upon another, that without the aid and assistance of others, and consequently without doing what he can to gain the love and friendship of mankind, none can be happy, however superior in parts or in property he may be to all about him. Every man stands in need of man ; in that sense all men are equal ; all men are dependent one upon another ; or every man is subjected to every man. This observation is so much the more necessary, that while some moral writers assert, that man has a right to all things and persons to which his power of subjecting them to his use can extend or be extended ; others speak of our natural equality in such a manner as if nature had not designed any superiorities among mankind, and as if all desire of, or endeavours after power or authority were unlawful ; which last must result in asserting, that all culture of the mind, and all industry are unlawful, because the natural consequence of the one is superiority in parts, and the natural effect of the other is superiority in property ; while the other terminates in affirming there is no distinction between power and right, or between power rightly and power unreasonably applied, *i. e.* no distinction between moral good and ill, *i. e.* no distinction between reasonable and unreasonable ; which difference must remain, while there is such a thing as public good or benevolence, or such a thing as reason, as hath been already fully proved. 6. If the preceeding principles be true, due attention to them will lead us through most of our Author's succeeding questions about derivative acquisitions and succession. Because the effect of property, which makes it the great reward of industry, is a right to dispose of our own in our life, or at our death, which admits no limitations but what benevolence sets to it ; in consequence of which right and duty, succession to him who dies without making a disposition of his estate, ought to take place in the way a wise man, directed by benevolence, must be presumed to have intended to dispose of his own at his death, *i. e.* according to the natural course in which benevolence

lence ought to operate and exert itself, already taken notice of. For when the will of a person is not declared, his will ought to be inferred from his duty. We shall therefore for some time have but little occasion to explain or add to our Author.

## C H A P. X.

*Of derivative acquisitions of dominion or property made during the life of the first proprietor.*

## Sect. CCLXVI.

Dominion being acquired, a change sometimes happens, so that one acquires either property or dominion in a thing, neither of which he before had; and such *acquisitions* we called above, (§ 240), *derivative*. Transi- tion to de- rivative acqui- sitions. Now, seeing the thing in which we acquire property was before that common: the thing in which we for the first time acquire dominion, was before that the property of some person: as often as we receive our own proper share of a common thing, there is *division*; as often as we acquire the whole thing in property, there is *cession*\*; and as often as another's property passes by his will into our dominion, there is, as we called it above (§ 240), *tradition*, or transferring.

\* The term *cession*, is sometimes taken in a larger acceptance, so as to signify all transferring of rights or actions from one to another. But since in that sense it may be comprehended under *tradition*, we use it here in a more limited signification, and mean by it, *the transference of right and dominion common to many, to one of the associates made by the consent of the rest*. Thus, e. g. if co-heirs transfer their whole title of inheritance to one of the co-heirs, they are said to have *ceded* their title or right to him.

## Sect. CCLXVII.

In all these cases, what was ours ceases to be ours any longer in whole or in part, and passes into the dominion or property of another person; and By them is made alienation necessary, voluntary, pure, or conditional.



this we call *alienation*, which, when it proceeds from a prior right in the acquirer, is termed *necessary*; when from a new right, with the consent of both parties, it is called *voluntary* \*. But the effect of either is, that one person comes into the place of another, and therefore succeeds both to his right in a certain thing, and to all the burdens with which it is incumbered. Alienation is called *pure*, when no circumstance suspends or delays the transference of the dominion; and when the transference is suspended, it is called *conditional* alienation.

\* Thus the alienation of a thing common to many, which is made when one of the associates demands a division, is necessary, because he who insists upon a division has already a right in the thing. In like manner, the alienation of a thing pledged to one is necessary, because it is done by virtue of the right the creditor had already acquired in that thing. On the other hand, the alienation of houses, which, one who is to change his habitation, sells, is voluntary, no person having a right in them. Thus is the division in the Roman law to be explained, l. 1. D. de fund. dot. l. 2. § 1. D. de rebus eorum qui sub tut. l. 13. l. 14. D. fam. ercisc. and elsewhere frequently.

## Sect. CCLXVIII.

And that  
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Voluntary alienation cannot be understood or take place otherwise than by the consent of both parties: but there may be consent either for a *present* alienation, so that the dominion may be transferred from us to another in our own life, or for a *future* alienation, so that another shall obtain the possession of what is ours after our demise: and this consent to a future alienation, is either actual, or it is inferred from the design and intention of the person \*. Now by the first of these is what is called *testamentary succession*; and by the latter is what is termed *succession to one who dies intestate*. We shall now treat of *present* alienation, and in the succeeding chapter we shall consider *future* alienation.

\* We

\* We therefore refer to future alienation, that possession of our goods which devolves upon a person after our death. If this be done by ourselves truly willing it, such a will is called a *testament*, and succession by virtue of such a will is called *testamentary succession*. But if it be inferred from the design and intention of the defunct, that he willed his inheritance to pass to certain persons, preferably to all others, this is *succession to an intestate*. Now, against both these ways of succession it may be objected, that no person can will any thing at a time when he cannot will at all; and that alienation cannot be made in this manner by a person while he lives, because he does not transfer neither right nor dominion to heirs while he lives; nor by a dead person, because, what he himself does not possess, he cannot transfer. And for these reasons, many very learned men deny that wills are of the law of nature, as Merill. obs. 6. 25. Thomas. not. ad tit. inst. de test. ord. p. 173. Gothofr. de Coccei. diff. de testam. princ. part. 1. §. 22. & seq. If these arguments conclude against the foundation of wills made by the dying person's real declaration of his will, *i. e.* testaments, in the law of nature, they conclude more strongly against succession to intestates; and therefore all this doctrine we have now been inculcating concerning *future alienation* is a chimera. But as we easily allow that these arguments prove wills, as defined in the Roman law, not to proceed from the law of nature. (See my dissertation de testam. jure Germ. arch. limitibus circumscripta, § 3. so we think they do not conclude against all sorts of future alienation and succession. And what the law of nature establishes concerning them, shall be enquired in the following chapter.

## Sect. CCLXIX.

The transition from community to property is made by *division* (§ 266), which is an assignation to any of the associates of his competent part of the whole in positive community. Now seeing any associate or sharer can exclude all but his fellow associates or sharers from the use of the thing common to them (§ 231); the consequence is, that any of the associates may demand the use of the thing according to the share belonging to him, and therefore may

What division is, and why one may demand it.

may demand a division; and the others, if they should oppose a division, are so much the less to be heard, that positive community doth very ill suit the present state of mankind \* (§ 238).

\* For since such a communion can only subsist among men endowed with great virtue, and it must become inconvenient in proportion as justice and benevolence wax cold and languid (§ 238), how can it hold long in our times? Which of two associates does not envy the other? Who is so careful about a common thing as his own? How apt is one to hinder another when he would meddle with a common thing? Who does not endeavour to intercept a part of his associate's profits? Hence a thousand animosities and contentions, as Aristotle has demonstrated, in opposition to the Platonic communion, Polit. 2. 2. So that the Romans had reason to pronounce partnership and communion the mother of discord, and to give power to any associate to demand a division, 1. 77. § 2. D. de legat. 2.

#### Sect. CCLXX.

How it  
may be  
done  
whether  
the sub-  
ject be di-  
visible or  
indivisi-  
ble.

A subject is either easily *divisible* into parts, or it is *indivisible*; either because in the nature of the thing, or by laws and customs, it cannot be divided into parts. If therefore an associate demand a division of a thing in its own nature divisible, nothing is more equal than to divide it into as many parts as there are associates, and to commit the matter to the decision of lot. But if the thing be indivisible, it is either to be left to one of the associates, who can pay, and bids most for it, or to whom age or chance gives a preference, who, a valuation being made, is to satisfy the rest; or it is to be sold to the best advantage, and the price is to be divided proportionably among the sharers; or they are to have the use of it alternately, each in his turn.

\* Thus we know the land of Palestine was divided among the Hebrews by lot, it having been separated in parts according to the number of their tribes. On the other hand,

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hand, it often happens among co-heirs, that one of them, either with the consent of the rest, or by the decision of lot, buys at a certain price the whole indivisible inheritance, and gives every one of the rest his share of the price. It likewise sometimes happens, that none of the co-heirs being rich enough to be able to satisfy the rest, the inheritance is sold to a stranger upon the best terms, and the co-heirs divide the price. Finally, Diether. in contin. thesauri Befold. voce *Muttschirung*, p. 417. Wehner observ. pract. ibidem, p. 370, have observed, that the alternate use of a common thing hath sometimes been agreed to by illustrious brothers, which is in some places called *Die Muttschirung*. We have an instance of it in the family of Saxony in Muller. in Saechsl. annal. p. 203.

## Sect. CCLXXI.

Moreover, because with regard to a common <sup>When e-</sup> thing all may have equal right, or some one may <sup>quality is</sup> have more right than others (§ 231); it is evident <sup>to be ob-</sup> that division is either *equal* or *unequal*. In the first <sup>served in</sup> case, all are called to equal shares, and in the second, <sup>division of</sup> to unequal shares. Now, since the natural <sup>things</sup> equality of mankind obliges every one not to arro- <sup>perfectly</sup> gate any prerogative to himself above any other <sup>common.</sup> without a just reason, in things belonging to many by perfect right (§ 177); it is manifest that division ought to be equal, and that none ought to claim any preference, unless his right to it can be clearly proved \*.

\* Such a pre-eminence may be due to one by law, by compact, and by the last-will of the former possessor, but not on account of greater strength or power, which Hobbes however seems to admit of, as giving a just prerogative above others in division, (*de cive*, c. 3. 15). For if such a reason be allowed to be just, the division of the lion in the fable is most fair and equal, *Phæd. fab.* 1. 5. who being to divide the prey with his fellow hunters, reasoned in this manner; "I take the first share as called *lion*; the second as being stronger you will give me; the third shall follow me because I am superior to you all, and woe be to him who dares to touch the fourth. Thus did



did his injustice carry off the whole booty." Whoever can call this a fair and just division, and he only, will grant what Hobbes asserts concerning a natural lot (*sortem naturalem*) as he calls superior power.

## Sect. CCLXXII.

Whether it ought likewise to be observed in the division of things imperfectly common.

These rules belong to *perfect* community. But there is likewise an *imperfect* community, as often as none of the partners hath a perfect right to the thing (§ 231). Now, when by the bounty of another any thing becomes thus common to many persons, it is at his option to give equal shares, or to give more or less according to merit\*. And in this case it would be most unjust for any one to complain that a person of less merit is put upon an equal footing with him (Mat. xx. 12, 15), or to take upon him to judge rashly of his own merit; or to think benefits conferred upon this or the other person, may be pled as precedents.

\* And this is that distributive (*δισταστική*) justice which ought to attend all those virtues which pursue the interest of others; as liberality, compassion, and rectoreal prudence, (the prudence of magistrates in conferring dignities, &c.) Grotius of the rights of war and peace, I. 18. who justly remarks, that this justice does not always observe that comparative proportion, called *geometrical proportion*; and that therefore Aristotle's doctrine on this head, is one of those things that often not always takes place, Grotius *ibidem*, n. 2. Nor is this opinion of Grotius overturned by Pufendorff of the law, &c. I. 7. 9. because he speaks of the distribution of things owing to many of good desert by perfect right, as by promise or pacts. Then what Arrian says is absolutely true, ep. 3. 17. "Such is the law of nature, that he who excels another is in a better condition in respect of what he excels in, than one who is worse or inferior." But in matters proceeding from mere good-will, this law of nature can hardly be pled; nor could these veterans justly complain of the emperor Hadrian, whom he ordered to rub one another in the bath, tho' some days before he had made a present of servants and money to one of their companions, whom he  
law

saw rubbing himself against the marble, Spartian Had.  
c. 17. because benefits are not to be wrested into examples.

Sect. CCLXXIII.

When a thing in common to many is resigned by the rest to one of the sharers, this is called *cession*. Wherefore, since in this case one succeeds into the place of all the others, the consequence is, that he succeeds into all their rights to that thing, and also into all the inconveniencies and burdens attending it (§ 267). And hence the Roman lawyers justly inferred that the same exceptions have force against the person ceded to, which would have had force against the ceder, l. 5. c. de her. vel act. vend.

What is  
cession of  
a thing in  
common?

Sect. CCLXXIV.

Since, whether the thing in common be divided, or whether it be ceded to one of the sharers, this seems to be the nature of the deed, that those who get the thing by division or by cession, acquire the right of excluding all others from the use of that thing; (§ 231) it is manifest that in both cases the associates oblige themselves, that he to whom the thing is transferred, shall not be hindered from taking possession of it; and therefore oblige themselves to warranty, and to repair all his loss, if it be evicted by another with right, and without the possessor's fault; since they have their shares safe and entire, while the other hath got a thing with an encumbered or burdened title.

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\* Thus the doctrine of eviction, which hath found place likewise in tradition or transferring, flows from natural equity, tho' many things be added to it by the civil law for clearing it, with respect to the form and effect of it, *e. g.* as when it requires that one should transfer to another in his own name; that the possessor should inform the transferrer of the suit in time; that the thing be evicted for a cause preceeding the contract; and not by violence, but by right, &c.

For

For every one may discern at first sight, that all these conditions proceed from natural equity.

## Sect. CCLXXV.

What tradition or delivery is, and if necessary to the transference of dominion?

We proceed now to *tradition*, by which an owner who has the right and will to alienate, transfers dominion to another, accepting it for a just cause. I say *dominion*. For tho' the Roman law orders the thing itself and its possession to be transferred, and does scarcely allow any right in a thing to arise previously to delivery : l. 20. C. de pact. yet such subtlety cannot be of the law of nature \*, as is justly observed by Grotius of the rights of war and peace, 2. 6. 1. 2. 2. 8. 25. and Pufendorff of the law of nature and nations, 4. 9. 6 : and the Roman lawyers themselves acknowledge, " That nothing can be more agreeable to natural equity, than that the will of an owner willing to transfer his goods to another, should take place and be confirmed." § 40. Inst. de rer. divis. l. 9. D. de adqu. rer. dom. Whence we conclude, that the will of an owner concerning transferring his dominion to another, whether expressly declared, or deducible from certain signs, is sufficient to transfer his dominion to another without delivery.

\* Nor did the Romans themselves anciently require that in every case. Delivery was only necessary with respect to things (*nec Mancipi*) of which one had not the full possession, as of provincial farms, *Simplic. inter rei agrar. script. p. 76.* Things (*Mancipi*) of which one had the property and full possession, were alienated (*per æs & libram*), so that the conveyance and title being made, the dominion was immediately acquired. *Varro de lingua lat. 4.* Therefore, from the time that Justinian took away the distinction between *res Mancipi* and *nec Mancipi*, and the *dominium Quiritarum* and *bonitarium*. l. un. C. de nudo jure Quirit. toll. & l. un. C. de usucap. transform, this law again prevailed, that dominion should be transferred without delivery or putting in possession.

Sect,

## Sect. CCLXXVI.

Since therefore the will of the owner to transfer his dominion to another, is equivalent to delivery, <sup>How it is done.</sup> and is a valid transference of his dominion to another (§ 275), it follows, that it must be equal, whether one absent, by interveening letters or words, or present, by giving the thing from hand to hand, or by inducting him into it, whether by long or short hand, or by certain symbols, according to the usage of the province (§ 242), or in whatever way he delivers it; so that nothing hinders but that a right may be conveyed or transferred to another without delivery, or by a *quasi-delivery*.

\* That symbolical delivery was not unknown to the Romans, appears from l. 1. § pen. D. de adqu. poss. l. 9. § 6. D. de adqu. dom. l. 74. D. de contr. empt. And the nations of German origine have been more acute in this matter: For they, in delivering conveyances and investitures, made use of almost any thing, a stalk of a tree, a rod, a turf, a branch, a straw of corn, a shrub, a glove, and other such things. See my Elem. juris Germ. 2. 3. 74. & seq. to which belongs the *Scotatio Danica*, c. 2. 10. de consuet. of which Strauchius Amoenit. jur. can. ecl. 5. and also Gundlingiana part. 7. dist. 4.

## Sect. CCLXXVII.

But since he only who hath dominion can transfer it or alienate (§ 275), it is plain that tradition <sup>Who has a right thus to transfer dominion.</sup> can have no effect, if it be made by one, who either by law, convention, or any other cause, hath no right to alienate; much less, if it be made by one who is not himself master of the thing; for none can convey a right to another which he himself has not \*. But, on the other hand, it is the same in effect, whether the master himself transfers his right immediately by his own will, or by his order and approbation.



\* Yet such a tradition, if made to one without his knowledge that it is so, constitutes an honest possessor till the true owner claims his own. Grotius of the rights of war and peace, 2. 10. and Pufendorff of the law of nature and nations, 4. 13. 6. & seq. endeavour to shew what such a possessor is obliged to do in point of restitution, what profits he may retain, and what he ought to restore, by a multitude of rules. We shall treat of this matter afterwards in its own place expressly (§ 312), and shall there shew, that the whole affair is reducible into two rules, 1. An honest possessor, during the time that the true owner doth not appear, is in his place, and therefore has the same rights that the owner would have, were he in possession. 2. When the true owner appears, he, if the thing subsists, is obliged to restore it with its existing profits; and if the thing does not subsist, he is only obliged to make restitution, so far as he hath been made richer by enjoying it.

## Sect. CCLXXVIII.

By trans-  
ference do-  
minion is  
not trans-  
ferred for  
every  
cause.

Because alienation ought to be made for a just cause (§ 275); but it is evident, from the nature of the thing, that by a just cause must be understood one sufficient for transferring dominion; therefore dominion cannot pass to another if a thing be delivered to one in loan, in trust, or letting; much less, if it be delivered to him on request and conditionally, or upon any terms revocable at the pleasure of the deliverer; yea, that no cause is sufficient, if he, to whom a thing is delivered, does not fulfil his bargain.

\* For when alienation is made to a person upon condition that he shall do something, it is conditional. But because the condition suspends the transference of dominion, the consequence is, that if the other does not perform what he promised, the dominion is not transferred, and the tradition becomes of no effect. Hence the Romans pronounced things bought and delivered not to be acquired to the buyer till the price was paid, or other satisfaction was made to the seller, § 41. Inst. de rerum divis. Hence Varro says, de re rustica, 2. 2. "A herd sold does not change its master till the money be paid." So Quintilian, Declam.

Declam. 336. "By what right can you claim the thing which you have not paid the price of?" So Tertullian de pœnitentia. "It is unreasonable to lay your hands on the goods; and not to pay the price."

Sect. CCLXXIX.

Besides, we said, in order to transfer, one must deliver with the design and intention of transferring dominion (§ 275). From which it is plain, that tradition cannot be made by infants, by madmen, by persons disordered in their senses, and other such persons, who are presumed not to know what is transacted: nor is it valid, if the owner gives a thing to one with the intention of lending, depositing, pawning it, or with any such like design; as likewise, that any one may reserve or except whatever right he pleases in transferring a thing; and that in this case, so much only is transferred as the alienator intended to transfer.

Sect. CCLXXX.

Whence it is easy to conceive the origine of *imperfect* or *less full dominion*. For since by that is understood nothing else but dominion, the effects of which are inequally shared between two persons; it is highly probable that its origine is owing to transference, with exception, or with reservation of a part of the dominion; which being done, there are two masters, one of whom acquires the right of excluding all others from reaping and using the fruits and profits of the thing, and of taking them to himself; the other has the right either of concurrence with respect to the disposal of it, or of exacting something, by which the acknowledgment of his dominion may be evidenced \*.

\* The last kind of less full dominion, the lawyers of the middle ages called *directum*, the former they called *prius utile*; not so elegantly indeed, but by terms received at the bar and in the schools, and which therefore it is not

now time to discard. But the one may be called the *superior* (*dominus superior vel major*) the other the *inferior master* (*dominus minor*), after the example of the Romans, who called the *patremfamilias*, *herum majorem*, and the *filiosfamilias*, *heros minores*, Plaut. Capt. 3. 5. v. 50. Trinum 2. 2. 53. Afinar. 2. 66.

## Sect. CCLXXXI.

The vari-  
ous species  
of it.

Since the nature of the (*dominium utile*) or dominion with respect to the use, is such, that the superior owner reserves to himself the right of concurrence with regard to the disposal of the thing, or the right of exacting something in acknowledgment of his superior dominion (§ 280); the consequence is, that tho' there may be various kinds of less full dominion, yet the whole matter in these cases depends on the agreement of the parties. However, if one stipulates with the possessor of the thing delivered to him for homage and services, and that the thing be not alienated without his consent; hence arise (*feudum*) the right of *fief* or *fealty*; if he stipulates that an annual tribute shall be paid in acknowledgment of his superiority; hence arises (*jus emphyteuticum*) the right of *holding in fee*. Finally, if he stipulates for a ground-rent, hence arises (*jus superficiei*) the right of *ground-rent* \*; and these are the principal kinds of dominion with regard to use in any nations.

\* Of holding in fee we have an example, Gen. xlvii. 26. according to Josephus, Antiq. 2. 7. Tho' Hertius thinks the lands of Egypt were rather made censual, or paid a land-tax, ad Puffend. jus nat. &c. 4. 8. 3. But if he place the difference between holding in fee and censual, in this, that in the former the possessor has only the dominion of use, and in the latter full dominion, it may be clearly proved, that the Pharaoh's of Egypt had a part of the dominion. For the Words of the Patriarch Joseph are, Gen. xlvii. 23. "This day I have bought you and your lands to Pharaoh." Of the (*jus superficarium*) or the right of ground-plots, there is a remarkable instance in Justin. Hist. 18. 5. Concerning the origine of fiefs the learned

learned are much divided, tho' they be common throughout all Europe. That there are many other sorts of less full dominion among the nations of German extract, I have shewn in my element. juris Germ. 2. 2. 23. & seq.

Sect. CCLXXXII.

If not the thing itself, and the dominion of it, but a certain use only be conveyed, he who receives it, acquires a *servitude* upon a thing belonging to another; and if the use be restricted to the person and life of him who is to have the use, it is *personal*; and if it be annexed to the estate itself, the use of which is conveyed, it is *real*. Since therefore in all these cases just so much right is transferred as the transferrer willed to transfer (§ 279), it follows, that in these cases likewise the matter comes to be intirely an affair of an agreement between parties; and therefore, almost all the subtleties to be found in the doctors about services are of positive law \*.

\* Hence the known tenets, that service consists not in doing, but in suffering or not doing; that it is indivisible, that its cause ought to be perpetual, that because the thing is to be used and enjoyed without hurting its substance, usufruct does not take place, where there is nothing to be used or enjoyed: That there is a great difference between usufruct, use, habitation, and the labour of servants; that some of these rights are lost by change of state, and some not: All these are of such a nature that right reason neither precisely commands them, nor opposes them, but they may be variously fixed and altered by pacts and conventions.

Sect. CCLXXXIII.

If a thing is delivered by the owner to his creditor, so that the deliverer continues to have the dominion, but the creditor has the possession for his security, then the thing is said to be *in pawn*. What right of pawn and mortgage, &c. If it be delivered in these terms, that the creditor shall likewise have the fruits of it by way of interest,



it is called *jus antichreticum*. Finally, if the right of pawn be conveyed to a creditor without delivering the money, we call it *hypotheca, mortgage*. As therefore in the former cases the creditor has a right, the debt not paid, not only to retain the thing pawned, but also to dispose of it, and deduct from the price what is due to him; so, in the latter case, the creditor may prosecute his right of possession of what is pledged to him for his security, *i. e.* attach it; and then detain it until his debt be paid, or even dispose of it for his payment.

(Tis not improper to take notice here, that this sort of mortgage called *Antichresis* in the Roman law, is nearly the same with that which is termed *vivum vadium* in the English law; which is, when a man borrows a sum of money of another, and maketh over an estate of lands unto him, until he hath received the said sum of the issues and profits of the lands, so as in this case neither money nor land dieth, or is lost. And therefore it is called *vivum vadium*, to distinguish it from the other sort of mortgage called *mortuum vadium*, Coke 1. Instit. fol. 205. Domat's civil law, &c. by Dr. Strahan, T. 1. p. 356.)

## Sect. CCLXXXIV.

How dominion  
passes to  
the ac-  
ceptor.

To conclude; we said, that by transferring, dominion passes to him who *accepts* of the transference (§ 275). But we *truly accept*, when we testify by words or deeds our consent that a thing transferred should become ours, and we are *presumed* to accept, whenever, from the nature of the thing, it cannot but be judged that we would not refuse or despise the thing one would transfer to us. In like manner, a thing may be *transferred* by the will of the transferrer, either expressly declared, or presumable from certain signs (§ 275). The most certain sign is gathered from his end and intention who hath acquired a thing, and hath bestowed care in keeping and preserving it\*.

\* But

\* But the end and intention of men in acquiring and managing with great care, is always, not only that they may not want themselves, but that it may be well with theirs when they are dead and stand in need of nothing. Hence Euripides in *Medea*, v. 1098.

*Sed quibus in ædibus est liberorum  
Dulce germen, eos video curis  
Confici omni tempore,  
Primum quidem, quo pacto bene ipsos educent.  
Et unde victum relinquant liberis.*

And in *Iphigenia in Aulide*. v. 917.

*Res est vehemens parere, & adfert ingens desiderium :  
Communeque omnibus est, ut laborent pro liberis.*

Sect. CCLXXXV.

Since therefore every one has a right to transfer his goods to others, and that alienation may be made upon any conditions (§ 267); the consequence is, that it may be made upon this condition, that another may obtain, after the alienator's death, the dominion and possession of a thing. Now, since this will may be truly declared, or can be certainly inferred from the intention of the acquirer; and since, in neither of these cases, the real and express acceptance of the other person to whom the transference is made, is necessary (§ 284); the former comes under the name of *succession to a last-will or testament*; and the latter is the genuine foundation of *succession to a person who dies intestate*.

C H A P. XI.

*Of derivative acquisitions by succession to last-will and to intestates.*

Sect. CCLXXXVI.

**A** *Testament*, in the notion of Civilians, is a solemn declaration of one's will concerning the transition of his inheritance and all his rights to another

How a testament is defined by the Roman lawyers.

another after his demise. And therefore, while the testator is alive, no right passes to his heirs; nay, not so much as any certain hopes of which they may not be frustrated; but the testator, while he lives, may alter his intention, and tearing or destroying his former will, make a new disposition, or die without a will \*.

\* Hence these known maxims of law, That the will of a testator is ambulatory till his death: That the last will alone is valid, being confirmed by death; or as Quintilian, *Declam.* 37. expresses it, "That testament alone is valid after which there can be no other," and several other such; yea, so far does this liberty with regard to testaments extend, that it is said none can deprive himself of the liberty of changing by any clause of renunciation, nor even by confirming his former testaments with an oath, *l. ult. D. leg. 2.* Grotius *de jure belli & pacis*, 2. 13. 19. *Leyser. medit. ad Pand. spec.* 43. n. 6. & 7.

#### Sect. CCLXXXVII.

Such a testament is not of the law of nature. First argument. But that such a testament is not known to the law of nature is evident. For tho' right reason easily admits that solemnities should be added to so serious an action, which is obnoxious to so many frauds; yet it implies a contradiction, to suppose a person to will when he cannot will, and to desire his dominion to pass to another, then, when he himself has no longer any dominion. This is so absurd, that the Romans owned the contradiction could not be removed but by mere fictions \*.

\* For since a testator neither transacts any affair with his heir when he disposes of his effects, nor the heir with the testator, when he acquires; and therefore, in neither case does any right pass from the one to the other; many things were feigned by lawyers, always very ingenious in this respect, to reconcile these inconsistencies. Hence they feigned the moment of testament-making to be the same with the very instant of dying, and the instant of death to be the same with the moment of entering upon a succession, bringing

bringing it back by fiction to the instant of death, l. 1. C. de 55. eccl. l. 54. D. de adqu. vel amitt. hered. l. 193. D. de reg. jur. Besides, they feigned the inheritance not entered upon to be no person's, but to represent the person of the deceased, § 2. Inst. de hered. inst. l. 31. § ult. D. eod. l. 34. D. de adqu. rer. dom. Ant. Dadin. Alteserra de Fict. jur. tract. 4. 2. p. 143. Jo. Gottfr. a Coccei. de testam. princip. part. 1. § 24.

## Sect. CCLXXXVIII.

Add to this, that no reason can be imagined why the survivors should hold the will of the defunct for <sup>Another</sup> argument. a law, especially when it very little concerns one, whatever his condition be, after death, whether Dion or Thion enjoys his goods\*: yea, the last judgments of dying persons often proceed rather from hatred and envy than from true benevolence; and in such cases, it seems rather to be the interest of the deceased that his will should not take effect, than that his survivors should religiously fulfil it. See our dissertation de testam. jure Germ. arct. limit. circumscript. §. 5.

\* Hence Seneca of Benefits, 4. 11. says very elegantly "There is nothing we settle with such religious solemn care as that which nowise concerns us." As this very grave author denies that these last judgments belong to men; so in the same sense Quintilian Declam. 308, calls them a will beyond death. Since therefore the Civilians do not allow even a living person to stipulate, unless it be the interest of the person stipulating, § 4. Instit. de inut. stip. how, pray, can the same Roman lawyers before the validity of the wills of deceased persons, when it is not for their interest? We readily grant that the souls of men are immortal, (which we find urged by the celebrated Leibnitz, nov. method. jurispr. p. 56.) but hence it does not follow, that souls delivered from the chains of the body retain the dominion of things formerly belonging to them, much less that they should be affected with any concern about them.

*Id cinerem & Manes credis curare sepultos?*

Virg. Æn. 4. v. 92.

Sect.



## Sect. CCLXXXIX.

What  
with re-  
gard to  
the testa-  
ments in  
other na-  
tions.

Since therefore the law of nature scarcely approves of testament-making, as described by the Roman laws, *i. e.* as Ulpian elegantly defines it, tit. 20. "A declaration of our mind solemnly made to this end, that it may take place validly after our decease," (§ 286); the consequence is, 1. That it no more approves like customs of other nations; and therefore, 2. That testaments of the same kind among Greeks or Barbarians, are no more of the law of nature and nations than those \* of the Romans; and for the same reason, 3. No nation hath accommodated their manners in this respect more to the simplicity of the law of nature than the Germans where there was no testament; (*heredes successoresque sui cuique liberi, & nullum testamentum*; Tacitus de mor. Germ. c. 20.)

\* We find, from the time of Solon among the Athenians, a similar kind of testament, consisting in will on one side, with regard to what ought to be done after death, Plutarch. in Solone, p. 90. and among the Lacedemonians from the times of the Ephor Epitadeus. Plut. in Ægid. & Cleom. p. 797, and among other Greeks, who all agreed, in this matter, in the same practice, as Isocrates tells us, in Æginet. p. 778. There are likewise examples of such testaments among the Egyptians, as of Ptolomy in Cæsar de bello civil. 3. 20. Hirt. de bello Alex. cap. 5. Attalus King of Pergamos, in Florus, Hist. 2. 20. Hiero of Sicily, of whom Livy, 24. 4. and finally among the Hebrews themselves, of whose way of making wills, see Selden de success. ad leg. Heb. cap. 24. But that it was not of ancient usage among them, and that it owed its rise to the interpretations of their doctors, may be proved, amongst other arguments, by this consideration, that there is not a word in their language for a testament, and therefore they gave it a Greek name. See our Dissertation de testamentif. jure Germ. arct. limit. circumscript. § 6.

Sect.

Sect. CCXC.

This being the case, Grotius gave a new definition of a *testament*, (of the rights of war and peace, 2. 6. §. ult.) he defines it thus; "Alienation to take place at the event of death, before that revocable, with retention of the right of use and possession." <sup>What with regard to Grotius's definition.</sup> But as this definition does not quadrate with what we commonly call *testament*, and is faulty in several respects; (Ziegler. ad Grotium, 2. 6. Pufend. de jure nat. & gent. 4. 10. 2. and the illustrious Jo. Gottfr. de Coccei. ibid. §. 4. & seq.) so it does not follow that testament-making is of the law of nature, because that law does not disallow of alienation at the event of death, revocable before that event, with retention of the right of possessing and using.

Sect. CCXCI.

But tho' the arguments above-mentioned plainly shew, that testament-making, according to the Roman law, is not of the law of nature, yet they are by no means repugnant to all dispositions with respect to future succession (§ 268) \*. <sup>What disposition with regard to succession after death is lawful by the law of nature.</sup> Let us therefore enquire what these are which are approved by the law of nature. And I answer, they are nothing else but pacts, by which dying persons transfer a possession itself, with the dominion to others; or men in good health give others the right of succeeding to them at the event of their death. For since we can dispose of our own, not only for the present, but for the future (§ 268), we may certainly make a pact for transferring to another what belongs to us, either to take place at present, or at our death \*.

\* And in the earliest ages of the world men disposed of their goods in no other way than this. So Abraham, having no children, had destined his possessions to his steward Eleasar, Gen. xv. 3. no doubt, by some *successory*, pact, or donation to take place at his death. The same Abraham,

ham, his wife Sarah being dead, having children by Kethura, distributed, while he was in health, part of his goods by donation, and gave the residue to Isaac, Gen. xxv. 5, 6. Thus Cyrus also at his death, in the presence of Cambyfes, gave his eldest Son the kingdom, and to the younger the lordships of the Medes, the Armenians and Cadusians, Xenoph. Cycrop. 8. 7. 3. Mention is made of a division and donation made by parents amongst their children upon the approach of death, Gen. xlviii. 22. Deut. xxi. 16, 17. 1 Kings, i. 35. Syrac. xxxiii. 24. and examples of it among the Franks are quoted by Marculf. Form. 1. 12. 2. 7.

## Sect. CCXCII.

What successory parts are valid.

Since every one therefore hath a right to transfer his goods for the present or for the future, at the event of his death (§ 291); the consequence is, that there is no reason why pacts about succession may not be pronounced agreeable to the law of nature \*. But, on the contrary, they ought to be deemed valid by the best right, whether they be reciprocal, or obligatory on one side only; and whether they be acquisitive, preservative, or remunerative; for as to dispositive pacts, that they bind the contracters, but not him whose heritage is disposed of, is evident, because he hath made no pact about his own.

\* The Roman law does not approve of them, but pronounces them contrary to good manners, and liable to very fatal consequences, l. ult. c. de pact. But the objections taken from the desire of one's death, that may thus be occasioned, do not lie stronger against such compacts than against donations in view of death, which are valid by the Roman law. Nor are those sad effects which Rome once suffered by legacy-hunters, an argument of any repugnancy between such pacts relative to succession after death and honesty, because neither testament nor any other human institution, is proof against the abuse of wicked men.

Sect.

Sect. CCXCIII.

Besides, since such is the nature of all transfers of property, that any one may except or secure to himself any part of, or any right in his own pleasures, in which case, so much only is transmitted as the owner willed to transmit (§ 279); it is evident, that it is at the option of the owner to transfer the possession to his heir by pact at once; or the right only of succeeding to his estate after his death; to transfer either revocably or irrevocably\*; with or without any condition; in whole or in part; so that there is no natural opposition between testate and intestate, as Pomponius seems to have imagined, l. 7. D. de reg. juris.

\* Thus Abraham transferred an irrevocable right to his Sons by Kethura. And Telemachus in Homer's Odyss. B. 17. v. 77. transferred a revocable one to Piræus,

*We know not yet the full event of all:  
Stabb'd in his palace, if your prince must fall,  
Us, and our house, if treason must o'erthrow,  
Better a friend possess them than a foe:  
Till then retain the gifts.*

Sect. CCXCIV.

But because a thing may be accepted, not only actually but presumptively, when from the nature of the thing it cannot but be concluded, that one will not refuse what another designs to transfer to him (§ 284); it must therefore be the same in effect by the law of nature, whether one be present and declares his consent, or being absent, so that he cannot accept verbally, there is no ground to apprehend that the liberality of another will be disagreeable to him\*; especially, if the inheritance designed for him be very profitable. There is however this difference between these cases, that in the former the heir acquires a valid and irrevocable right,



right, unless the owner hath expressly reserved to himself the faculty of revoking ; whereas in the latter, there is liberty to revoke till acceptation be made : And whereas an heir having declared his consent, cannot renounce the heritage he hath accepted, he whose consent is presumed, may enter upon or refuse the heritage transferred to him, as he thinks proper.

\* This whole matter is admirably illustrated by the chancellor of our college, my beloved colleague Jo. Petrus a Ludewig, in a dissertation wrote with great judgment and erudition, *de differentiis juris Romani & Germanici in donationibus, & barbari adnexus, acceptatione*. Hal. 1721, where he hath shewn by impregnable examples and arguments, that neither the nature of donation, nor the Justinian, nor the Canon, nor the German law, requires acceptation made by words or other signs, and hath solidly refuted all objections.

Sect. CCXCV.

The foundation of succession to one who dies intestate.

But if an owner can really and truly will that his goods may be transferred to one after his death (§ 291), there is no reason why as much should not be attributed to one's will, presumed from his end and intention, as to one's will expressed by words or signs (§ 268). Now we have already shewn, that it is not the end and intention of those who acquire any thing, and take care of their acquisitions, that they should after their death be held for things relinquished to the first occupant ; but that they should be advantageous to those whom they love and wish well to (§ 284). But hence we may justly conclude the succession to belong to them, preferably to all others, for whose sake chiefly the defunct acquired and took care of his acquisitions with so much concern and sollicitude \*.

\* This is so true, that nothing ordinarily is so vexatious and tormenting to men as the thoughts of their estate's falling

ling to men they hate, after their death, and when, as the Poet has it,

*Stet domo capta cupidus superstes,  
Imminens lethi spoliis, & ipsum  
Computet ignem.*

Nothing is more certain than what Pindar says in a passage quoted by Pufendorff on this subject (of the law of nature and nations, 4. 11. 1.) " Riches which are to fall into the hands of a stranger, are odious to the dying person.

Sect. CCXCVI.

But because this is not a duty of perfect obligation, but rather a species of humanity, which pays <sup>Axioms relating</sup> regard to persons and ties or connexions, and <sup>to it.</sup> therefore prefers relatives to strangers (§ 220); hence we have reason to infer, that relatives exclude all strangers from succession, and that among relatives those of the nearer degrees are preferable; and that many of the same line and degree have equal rights to succession\*.

\* For tho' it be not always true, that kindred are dearer to one than strangers: yea, so far is it from it, that love amongst brothers is very rare: yet since, if the defunct had been of that opinion, nothing hindered him to have disposed of his estate as he pleased, and to have left it to whom he liked best (§ 291); and he chose rather to die without making such a disposition; he cannot but be judged not to have envied the inheritance of his goods to his relatives, whom natural affection itself seems of choice to call to the succession. But one is nearer, not only in respect of degree, but likewise in respect of line. For Aristotle hath justly observed, that natural affection falls by nature upon the descending line, and failing that upon the ascending line, and failing both these upon the collateral, Nicomach. 8. 12. Hence Grandchildren, tho' in the second degree, are nearer than a parent, and a great grandfather, tho' in the fourth degree, is nearer than a brother, &c.

Sect.

## Sect. CCXCVII.

The suc-  
cession of  
children.

Since of relatives the more remote are excluded by the nearer (§ 296), but none can be reckoned nearer to one than children are to their parents; therefore they are justly preferred in succession to their parents before all others, and that without distinction of sex or age \*: For as to the preference given in some countries to males, and to the first-born, that, because it is making an unequal division among equals, proceeds from civil law, pact, or some other disposition; and so it is not of the law of nature (§ 271).

\* But if the thing be indivisible, there is no doubt it may (*ceteris paribus*) be left to the first-born, on condition that he make satisfaction to the rest (§ 270). The first-born are wont to have a special prerogative, if the heritage be indivisible; especially if it be a crown or sovereignty. Cyrus in Xenophon says elegantly, "This also I must now declare to you, even to whom I leave my kingdom, lest that being left doubtful, should occasion disquiets. I love you, my sons, both with equal affection: But I order that the eldest should govern by his prudence, and do the duty of a general, when there shall be use or occasion for it, and that he should have, in a certain suitable proportion, the larger and superior use of my demesnes." Tho' the affections of kings be equal towards all their children; yet the nature of government itself seems to require, that sons should be preferred in succession to sovereignty to daughters, and amongst them the eldest to the younger, inasmuch that it is become, as Herodotus says, a received law in all nations, l. 7. p. 242. and what is done against this rule, is, according to the ancients, against the law of nations. See Justin. Hist. 12. 2. 24. 3. Liv. 40. 9.

## Sect. CCXCVIII.

Legiti-  
mate chil-  
dren only  
succeed to  
the father,

But if in succession to parents children be justly preferable to all others (§ 297), and this may be concluded from the presumed will of parents, (§ 295); the consequence is, that it ought to be certainly

certainly known who is the child. But because that cannot be ascertained except in the case of lawful marriage; hence we infer, that legitimate children only, even posthumous ones, and not illegitimate ones, or bastards, succeed to a father; but that all children succeed promiscuously to a mother; tho' none will deny that a father may take care of his illegitimate children in his disposition.

## Sect. CCXCIX.

Besides, it may be inferred from the same will of parents (§ 295), that the succession of descendents extends not only to children of the nearest, but of the more remote degrees; and therefore that grandsons and granddaughters are admitted to inherit, as well as sons and daughters; and that not only if there be no children of the first degree, but if they concur with them; so that the right of representation, by which children of the remoter degrees succeed into the room of their parents, and receive their portion, is most agreeable to the law of nature.

\* And this is the foundation of the succession of children of the first degree, *in capita*, by heads, and those of remoter degrees, *in stirpes*, by descent. That this is consonant to the law of nature appears even from hence, that if contrariwise, all should succeed *in capita*, the condition of the surviving children would be rendered worse by the death of a brother or sister, and the condition of grandchildren would be bettered by the death of their parents, and so there would be no equality among them. For if the father were worth a hundred pieces, and had four children, each would get twenty five pieces. Now suppose one of the four, contrary to the course of nature, to have died before the father, leaving seven grandchildren to him: in that case, if all succeeded *in capita*, each would get ten pieces; and thus by the brother's death, the three children of the first degree would have lost forty five pieces, and the seven grandchildren would have gained as much by the untimely death of their father. But since no reason can be

Q.

assigned



assigned why the death of a brother should diminish the patrimony of the surviving brothers or sisters, and add to that of the grandchildren; no reason can be given why both should be admitted to succession equally *in capita*.

## Sect. CCC.

What if  
none other  
exist?

From the same rule, that the nearest of many relatives are to be preferred (§ 296), it follows, that grandchildren are to be preferred both to the parents of the grandfather, tho' nearer in degree, and to his brothers and sisters, tho' equal in degree. For one is to be judged nearer, not only in respect of degree, but chiefly in regard to line (§ 296) \*. But whether natural equity in this case calls grandchildren to succession by heads, or by descent, may be easily understood from what hath been said in the preceding scholium.

\* For no reason can be brought, why the condition of one issue should be bettered and another worsted by the untimely death of parents; which must however be the case, if the grandchildren surviving their parent should be admitted by heads: Because, suppose a man worth a hundred pieces to have four sons, and to have by the first, one, by the second, two, by the third, three, and by the fourth, four grandchildren alive; if the sons had survived they would have received each twenty five pieces, and have consequently transmitted each to his children as much. But if they dying, the grandchildren be admitted to succession by heads, each would get ten pieces, and thus the one grandchild by the first son would lose fifteen pieces, the two by the second five, and the three by the third would gain five, and the four by the fourth would gain fifteen. But if this be unreasonable, it must be unreasonable to admit grandchildren in this case to succession by heads.

## Sect. CCCI.

Succession  
in the a-  
scendent  
line.

Since, failing the line of descendants, the nearest is the ascendent (§ 296), hence it is plain, that the mournful succession to their children is due to the progenitors \*, and in such a manner, that the

the nearer in degree excludes the more remote, and those of the same degree come in equally. Nor does the law of nature in this case suggest any reason why the inheritance of children should be divided among many of the same degree according to lines; so that these, and like cases, must rather be left to the determination of civil laws.

\* This is so agreeable to right reason, that whereas the divine law established this order of inheritance, that the sons should stand first, the daughters next, then the brothers, and in the fourth place the uncles by the father's side, Num. xxvii. 8. & seq. Philo remarks, that something ought here to be supplied by right reason. "For it would be foolish (says he) to imagine, that the uncle should be allowed to succeed his brother's son, as a near kinsman to the father, and yet the father himself be abridged of that privilege. But in as much as the law of nature appoints (*where by the law of nature Philo undoubtedly understands the order of nature*) that children should be heirs to their parents, and not parents to their children, Moses passed this case over in silence as ominous and unlucky, and contrary to all pious wishes and desires, lest the father and mother should seem to be gainers by the immature death of their children, who ought to be affected with most inexpressible grief: Yet by allowing the right of inheritance to the uncles, he obliquely admits the claim of the parents, both for the preservation of decency and order, and for the continuing the estate in the same family." Nor do the Talmudists reason otherwise about succession in the ascendent line. See Selden *de success. in bona def. ad leges Hebr. cap. 12.* where this matter is fully and accurately handled.

## Sect. CCCII.

It follows from the same principle (§ 296), that <sup>Succession</sup> failing both the ascending and descending line, <sup>of collate-</sup> the succession to intestates devolves on the collateral <sup>rels.</sup>

kindred, according to the degree of nearness in which they stand; nor is there any reason why the *right of representation* should take place among collaterals\*; much less is there any reason why duplicity of ties, or the origine of the goods should

make any difference. In this case, many of the same degree equally divide the inheritance: nor is there any difference how far they may be removed from the defunct, seeing it was in his power to appoint another heir, if he had no mind they should be made happy by his estate.

\* For since succession belongs preferably to those for whom the defunct chiefly acquired and managed with care (§ 295), and experience shews us, that affection is commonly no less ardent towards the remoter than the nearer descendents: Hence it is justly concluded, that grandfathers had no inclination to take from their grandchildren what was due to their parents; and on account of this presumed inclination or will, they ought to succeed to the rights of their parents. On the other hand, the same experience teaches us, that with respect to collaterals, affection diminishes every remove, and therefore it does not follow that a brother's son, *e. g.* should come into the same place with the uncle as his brother. Hence there is no reason why a brother's son should concur with brothers in succession.

## Sect. CCCIII.

Much is here left to civil legislators.

So far does right reason acknowledge the right of succession in kindred. But because it is obvious to every one, that all these things belong rather to the permissive than to the preceptive part of the law of nature, much must here be left to civil legislature, to fix and determine by their laws, as the end and interest of their states may require (§ 18.) And hence it is easy to give a good reason why legislators have thought the surviving wife should be taken care of; and why there is no branch of law almost in which civil laws and statutes so much differ, as with regard to succession to intestates.

## Sect. CCCIV.

Whether any heirs be necessary?

Seeing this whole right of succession proceeds from presumed will (§ 285); but he, whose consent is presumed, may enter upon an inheritance,

or

or renounce it as he pleases (§ 294), it must be evident to every one, that *necessary* heirs are unknown to the law of nature \*. And therefore that no person is heir to an intestate by unalterable right, but becomes such by his consent, declared by words or deeds.

\* That reason is quite a stranger to heirs necessary, voluntary and extraneous, is plain, because it knows nothing of the reason lawyers had in their view in making such distinctions. First of all, this quality and difference of heirs belongs chiefly to testamentary heirs, to which, as we have already observed, the law of nature is a stranger (§ 287), because to one who dies intestate, no servant succeeds as necessary heir. Again, a testament among the Romans was a sort of private law. And they thought a testator could indeed give law to his servants and children, whose duty and glory it was to obey their will, but not to strangers not subject to their power. Hence they called those *necessary* and these *voluntary* heirs, (Elem. sec. ord. Inst. § 95.) But since the law of nature knows nothing of all this, it cannot possibly know any thing of this difference with respect to heirs.

## Sect. CCCV.

Now, when one determines to succeed to another, nothing is more equal, than that he should be adjudged to succeed to all his rights and burdens (§ 267); whence it follows, that an heir, whether by the real disposition of the deceased, or by his presumed will, acquires all his rights, which are not extinguished by his death; and that he has no reason to complain, if he be bound to satisfy all his obligations, as far as the inheritance is sufficient \*. How heirs succeed to the rights and obligations of the deceased.

\* Not therefore, *in solidum*, in whole. For since there is no other reason why an heir is obliged to fulfil what the defunct was bound to do by buying or hiring, and to pay his debts, but because he hath acquired his goods, no reason can be imagined why he should be bound farther than the inheritance is sufficient to answer. Besides that



riour of the Roman law, by which an heir succeeded to all the obligations of the defunct, turns upon a fiction, that the heir and the defunct are the same person, l. 22. D. de usucap. l. 14. C. de usufr. Novell. 48. præf. Ant. Dadin. Alteserra de fiction. jur. tractat. i. cap. 20. p. 48. Now since the law of nature knows no such fiction, it cannot know that which follows from it alone.

## CHAP. XII.

*Concerning the rights and duties which arise from property or dominion.*

### SECT. CCCVI.

A three-  
fold effect  
of domi-  
nion.

**D**ominion is the right of excluding all others from the use of something (§ 231). But when we exclude others from the use of a thing, we pretend to have the sole right of using it. Hence the first effect of dominion is the *free disposal* of a thing; *i. e.* the right or faculty of granting any one the use of it; nay, of abusing it, and of alienating it at his pleasure. Again, from what we can justly exclude others, that we retain to ourselves with that intention, and therefore *possession* is amongst the effects of dominion. Finally, we also exclude others from the use of a thing, when, being in another's possession, we reclaim it. But to reclaim a thing in another's possession, being to endeavour to *recover* it, it follows, that one of the noblest effects of dominion is the right of *recovering* our own from whomsoever possessing it.

\* All these effects of dominion are acknowledged by the Roman law. For what is said by Caius, l. 2. D. si a par. quis man. "That it is unjust for men not to have the liberty of alienating their goods," it is to be understood of free disposal. In like manner Paullus infers, from the right of possession belonging to the lord or master only, l. 3. § 5. D. de adqu. vel amitt. possess. "That many cannot possess

possess the same thing in whole; and that it is contrary to nature that you should possess what I possess. That two can no more possess the same thing, than you should occupy the same place in which I am." All belonging to the reclaiming of a thing, which is the principal action arising from dominion, is well known. Hence it is among the paradoxical themes of dispute, "That the lord of timber cannot recover it, if it be joined, § 29. Inst. de rer. divis.

Sect. CCCVII.

Since therefore the owner has a right to *apply* his own to any use whatsoever (§ 306), the consequence is, that he has a right to enjoy all the profits arising from the thing itself, and from its accessions and increments, as far as these can be acquired by the proprietor (§ 250); and therefore to reap all the fruits, and either to consume or share them with others, or to transfer them to others upon whatsoever account. Nay, because the yearly fruits and profits of things may be increased by art and careful management, nothing hinders a master from altering the thing, and so rendering it more profitable, provided he do not by so doing deprive another of his right.

\* This right belongs to the master only, as is plain when we consider the right of usufruct, of use, of loan, of hire, all which, because they are exercised about a thing belonging to another, do not include the right of changing a thing at pleasure, tho' all of them include the right of reaping the fruits. Therefore the right of taking the profits may be common to the master with others, but the faculty of changing the thing, *i. e.* the principal or substance, is proper to the master only, nor can he who has the right of use, usufruct, loan or hire, claim it without his permission.

Sect. CCCVIII.

Since he hath likewise the right of abusing the thing and its fruits, Donat. ad Terent. Andr. (§ 256), *i. e.* of consuming, or of destroying the thing and its fruits, Donat. ad Terent. Andr.

As likewise of corrupting or spoiling it.

prolog. v. 5. the consequence is, that the master may destroy the thing which is his own, provided he do it not with that intention that another may thereby receive detriment \*. For tho' such a spoiling of our own goods, which may be beneficial to others, be repugnant to the love of humanity (§ 217); yet he does not violate expulsive justice, who, in consequence of his having dominion, abuses his own, and without any necessity urging him so to do, corrupts it.

\* For if any corrupts his own with an intention to hurt another, he does it with a design to injure another, and by doing hurt to him, really injures another. But it being the first and chief principle of natural law, not to hurt any one (§ 178), the consequence is, that he acts contrary to the law of nature who spoils his own goods with such an intention. And to this class belongs the wickedness of those who poison their flowers to destroy their neighbour's bees, Quinct. Declam. 13.

## Sect. CCCIX.

As likewise of alienating them. Because the free power or right of a master to dispose of his own comprehends likewise the right of alienation (§ 306), it may easily be understood, that an owner can abdicate his dominion, and transfer it to another, either now, or for a time to come, and grant any other advantage by it, or right in it, to any person; and therefore give it in use, usufruct, mortgage, pledge, as he will, provided no law, no pact, no other more valid disposition stand in his way.

## Sect. CCCX.

Since possession also is one of the effects of dominion (§ 306), it is plain that the owner can take possession of what belongs to him, and defend his possession against every one, even by force; and that it makes no difference whether one possesses by himself or by another; yea, that possession once acquired,

acquired, may be retained by an absent person, and by will merely, while another hath not seized it \*.

\* For possession is the retention of a thing, from the use of which we have determined to exclude others (231). As long therefore as we have determined to exclude others from the use of a thing, so long we have not relinquished it (§ 241): Wherefore, such a thing is not without a master, and none has a right to seize it. But what none hath a right to seize, I certainly retain the possession of, even tho' at distance, by my will merely.

## Sect. CCCXI.

Finally, the right of *recovering* a thing being a- The right also of recovering it. mong the effects of dominion (§ 306), it cannot but be that we may use our right against any possessor of what is ours; nor does it make any difference as to the restitution, whether one detain what is ours from us honestly or fraudulently; nor whether he be known to us or a stranger; because we do not reclaim the thing on account of any deed of his; but because we have a right to it. Besides, since to reclaim and recover a thing is not the same as to redeem it; it is manifest, that when an owner recovers his own, he is not bound to restore the price; tho' equity doth not permit that one should be enriched at another's expence (§ 257), or that he should refuse the necessary and useful expences laid out upon a thing by the possessor \*.

\* To which case, without all doubt, belong the expences, without which the master himself could not have recovered his own from robbers, especially if the possessor redeemed it with intention to have it restored to its owner, Pufend. law of nature, &c. 4. 12. 13. at which paragraph Hertius in his notes has brought an excellent example from Famian. Strada's Decades de bello belgico, l. 7. ad annum 1572. "When the merchants of Antwerp had redeemed merchandize of above a hundred thousand pieces in value, from a Spanish foldier, who had plundered the city of Mechlin, for twenty thousand, the owners



owners got them back, upon restoring that sum, because they could not have recovered the goods with less expence."

## Sect. CCCXII.

How far  
he may  
recover  
the acce-  
ssions and  
fruits.

Since the owner can claim to himself all the accessions and fruits of his own goods (§ 307), it may be enquired, whether an honest possessor be obliged to restore to the owner reclaiming his own, all the accessions, and all the fruits, nay, all the gain he hath received from another's goods? We conceive thus of the matter in a few words. He who honestly, and with a just title, possesses a thing, as long as the true owner is not known, has the right of excluding all persons from the use of what he possesses. But he who has this right is in the room of the owner (§ 231), and therefore enjoys all the same rights as the owner; yet, because he is not the true master who possesses a thing honestly, there is no reason why he should desire to be enriched to the loss of the true owner; as there is none, on the other hand, why the master should claim to himself the fruits not existing, which were not owing to his care and industry \*.

\* For a natural accession to a thing, the master of which is not known (§ 241), belongs to none, and so goes to the first occupant. Since therefore the honest possessor has seized the fruits which he produced by his own care and industry, there is no reason why they should be taken from him. And therefore the Justinian law not absurdly says, "That it is agreeable to natural equity and reason, that the fruits which an honest possessor hath gathered, should be his for his care and labour." Nor is the case different with regard to civil fruits. For they, in like manner, when they are received having no certain master, and the true master of the substance producing them, having had no trouble about, belong also to an honest possessor, so long as the true master does not appear.

Sect.

## Sect. CCCXIII.

Because neither ought to be enriched at the other's The ac-  
 loss (§ 312), the consequence is, that even the ac-cessions  
 cessions ought to be restored to the master reclaim-and the  
 ing his own thing, and therefore he hath a right fruits be-  
 to demand the existing and hanging fruits\*, the long to  
 expences laid out upon them being deducted; be-the ma-  
 cause the master would be enriched to the detriment ster.  
 of the honest possessor, if he should take to himself  
 the fruits upon which he had bestowed no care.

\* This Grotius grants (of the right of war and peace,  
 2. 8. 23. and 2. 10. 4.) but only with respect to natural  
 fruits. But since even the industrial fruits are accessions to  
 the principal of an owner, who is now known, no reason  
 can be imagined why an honest possessor should claim them  
 to himself. But the master can by no means refuse to  
 repay expences, because he would otherwise demand  
 fruits which he did not produce by his care and industry  
 (§ 312). Whence the Hebrews thus proverbially describ-  
 ed a hard austere man, "One who reaps where he did  
 not sow, and gathers where he did not straw, Mat. xxv.  
 24. Luke xix. 21.

## Sect. CCCXIV.

But since a natural accession to a thing, the own-The fruits  
 er of which is not known, goes to the first occu-gathered  
 pant as a thing belonging to no body, the same is and con-  
 to be said of the civil fruits (§ 212); consequently, sumed to  
 the fruits gathered ought to be left to an honest the pos-  
 possessor, who bestowed his labour and care about sessor.  
 them, unless he be made richer by them \* (§ 212.)

\* The Civilians follow this principle in demanding an  
 inheritance, l. 25. § 11. & § 15. l. 36. § 4. l. 40. § 1.  
 D. de hered. petit. But in reclaiming a thing, they ad-  
 judge indiscriminately the reaped fruits to an honest pos-  
 sessor, and make no account of the matter, whether he be  
 enriched by them or not, l. 4. § 2. D. fin. regund. l. 48.  
 pr. D. de acqu. rer. dom. But the reason of this differ-  
 ence is merely civil, and not founded in natural law. For  
 in

in suing for heritage, as being an universal action, the price is deemed to succeed into the room of the thing, not in singular actions. But the law of nature does not make these distinctions; and therefore it is most equal that those received fruits should be indiscriminately restored to the true owner, by which one is made richer. And that this is now the practice observed in courts, is observed by Stryk. Us. hod. Digest. 6. 1. 12.

## Sect. CCCXV.

Whether an honest possessor be obliged to pay the value of a thing consumed, perished, or alienated. From the same rules, that an honest possessor is in the room of the owner, but yet cannot enrich himself at the detriment of another (§ 312); we infer, that he is no more obliged to make restitution to the owner, if he infraudulently consumed the thing, than if it had perished in his possession by chance; but that he is obliged, if he sell the thing he acquired without paying any price, or a small price, for a greater price, because he would be richer at another's cost, if he kept the profit to himself. On the other hand, this obligation ceases, if the owner hath already received the value of his thing from another; partly because in this case an honest possessor is indeed made richer, but not at the cost of the owner; and partly because the owner has a right not to sue for gain, but only for loss.

## Sect. CCCXVI.

What a fraudulent possessor is obliged to restore. Because all this belongs to honest possessors only; and, on the other hand, because fraudulent possessors are neither in the room of the owner, nor have they the right of use, on this score, that the owner is not known to them; and therefore none of these reasons, why one may enjoy any advantage by a thing, or its fruits, takes place; hence it is plain, that they are strictly bound not only to restore what is existing, but to refund the value of things consumed or alienated; and much more,  
of

of all the fruits they have, or might have reaped from them, and likewise to run all risks \*.

\* For tho' accidents be regularly imputable to no person (§ 106), yet this rule does not take place if it was the agent's fault that any accident happened (§ *ibidem*), because then there is default as well as accident. Now, a fraudulent possessor could and ought to have restored the thing to its true owner, and if he had done it, he would have prevented its perishing in his hands. He is therefore obliged to answer for all accidents; whence the Roman lawyers have rightly determined, that a thief and robber are answerable for all chances, because they are always the cause why a thing is not in the possession of its owner, (*quia semper in mora sint*) l. 8. § 1. D. de *condict. furt.*

### Seçt. CCCXVII.

Now these are the rights which arise plainly from dominion; but since it belongs to civil law to adjust indifferent actions to the interest of each people or state (§ 18); and it is frequently the interest of a state, that no member should make a bad use of his goods (*Instit. § 2. de his qui sui vel alieni juris sunt,*) it is no wonder that dominion is sometimes confined within narrower limits by governors of states, and that sometimes the liberty of disposal, sometimes the right of taking possession, and sometimes the right of recovering, is either wholly taken away from owners, or not allowed to them but under certain restrictions \*.

\* Thus we find the civil law taking the free disposal of their goods from pupils, mad persons, prodigals, minors. The same law does not allow a legatee, tho' owner of the thing left to him in legacy, to take possession, and gives the heir a prohibition against him, if he goes to seize at his own hand. (*Interdictum quod legatorum*) tot. tit. D. quod legat. Again, it is known that he, whose timber another hath joined, tho' he be the owner of the materials, and doth not lose his dominion, yet he cannot recover the timber when joined, by the laws of the twelve tables, § 29. *Instit. de rerum divis.* l. 7. D. de *adqu. rerum dom.* So that



that there is almost no effect of dominion which the civil laws suffer to remain always and wholly safe and entire, if the public good of the common-wealth require it should not : For this magistrates justly account the supreme law in all those matters, which belong to the permissive part of the law of nature. Because, since any one by the law of nature may renounce his permissive rights (§ 13), a people may also renounce them, and hath actually renounced them by submitting themselves to the laws enacted by the supreme power under whose authority they have put themselves.

## Sect. CCCXVIII.

Sometimes by the pacts and dispositions of the first owners.

And because an owner has the liberty of disposing of his goods in his life, or in the prospect of death (§ 268), and then just as much is transferred to another, as he who alienates willed to transfer, (§ 279), it is plain the effects of dominion may be restricted by the pact and disposition of the former owner \*, and in this case the possessor can arrogate no more to himself than he received from the former owner, unless he in whose favour the restriction was made, voluntarily quit his right, cease to exist, or lose his right by a just cause.

\* Thus sometimes the right of reaping all advantage from a thing is circumscribed within narrower limits by the disposition of the former owner, as, *e. g.* if he hath given another the usufruct, any right of service, or hath pawned it (§ 282). Sometimes the liberty of disposing, destroying, and alienating is taken from the master, as when the dominion or right of use merely is given him (§ 279) ; or when the thing is burdened with some fiduciary bequest, &c. An usufruct being constituted, even the right of possession, which could not otherwise be refused to the owner, is restricted ; as when the right of use is given to one, the direct or superior lord has neither the right of possessing the thing, nor of claiming what appertains to the right of use.

Sect.

## Sect. CCCXIX.

Hitherto we have only treated of rights arising from dominion or property. Now since right and obligation are correlates, and therefore a right being constituted an obligation is constituted (§ 7); the consequence is, that as many rights as dominion gives to an owner, just so many obligations does it lay others under with regard to the owner. Because therefore an owner hath the liberty of disposing (§ 306), they injure him who hinder him in disposing or enjoying the fruits of his own \*: They also do him damage who corrupt or spoil the fruits and accessions of his property. And in general, since he who intercepts or corrupts any thing that tends to the perfection or happiness of another certainly wrongs him (§ 82), but none ought to be wronged (§ 178); hence we may justly conclude, that none ought to have his free disposition of his own disturbed or hindered; that none ought to have his goods damaged; and therefore, if any thing of that kind be done, the author of the injury is bound to make reparation, and is moreover liable to punishment.

A proprietor ought not to be hurt by any one in the use of his own.

\* For the Roman lawyers define *an injury* to be not only any wrong done to a person by words or deeds, but any action by which one is hindered from the use either of public things, or of what is his own, or by what one arrogates to himself any degree of liberty in disposing of what belongs to another. Thus by the leg. Cornel. he is guilty of injury who enters another's house forcibly, l. 5. pr. D. de injur. he who hinders one to fish in the sea, or to draw a drag-net, to bath in public baths, to sit on a public theatre, or to act, sit, or converse in any other place, or who does not permit us to have the use of what is our own, l. 13. § 7. D. eod.

## Sect. CCCXX.

Seeing possession belongs to the rights of property (§ 306), the consequence is, that it is our duty to see that we do not directly or indirectly suffer

intercept  
or hinder  
his posses-  
sion.

suffer every one to possess his own quietly and unmolested, and not to deprive any one of his possession against his will directly or indirectly. And that if any one can be proved to have done any such thing, he is bound as an injurious person, to repair all the damage he has done, and is moreover liable to condign punishment.

Sect. CCCXXI.

It is done  
directly  
by theft,  
rapine and  
violent e-  
jection.

One carries off another's possession directly, either by open force, or by taking it away clandestinely. The latter is called *theft*. The former, if the thing be moveable, is called *rapine*; and if it be immoveable it is called *force*, or *violent ejection*. *Theft* is therefore taking away another's goods in a clandestine manner, without the knowledge and against the will of the owner, to make profit of them \*. *Rapine* or *robbery* is bearing off a moveable thing by violence, against the owner's will, to make profit of it: And *force* is ejecting one violently out of his possession of an immoveable thing.

\* If a thing be carried away to affront one, or by way of contumely, it is called an *injury*; if it be carried away in order to spoil it, it is called *damage*. Thus in Homer, *Iliad*. A. v. 214. Minerva says that Chryseis was taken from Achilles *ἔχριστος εἶνεκα*, to rub an affront upon him. It was therefore an injury, and not theft or robbery. And he is more properly said to have damaged than to have stolen, who, as Horace says, *Serm.* I. 3. v. 116.

*Teneros caules alieni infregerit horti.*

But without doubt Cacus was guilty of theft properly so called,

*Quatuor a stabulis præstanti corpore tauros  
Avertit, totidem forma superante juvencas,  
Atque hos, ne qua forent pedibus vestigia rectis,  
Cauda in speluncam tractos, versisque viarum  
Indiciis, ruptos saxo occultabat opaco.*

Virg. *Æneid*. 8. v. 207.

Tho'

Tho' the ancients thought theft might be said of immovables (l. 38. D. de usurp. & usucap. Gell. Noct. Attic. 11. 18. Plin. Hist. nat. 2. 68. Gronov. observ. 1. 4. p. 42.) yet this application of the word is inconvenient, and therefore we do not use it in that sense.

## Sect. CCCXXII.

One is said to take away another's possession *in-Indirectly directly*, who by fraudulent words or deeds is the *by de-fraudating* cause of his losing it; and this we call *defraudation*. Now since one is likewise hurt in this manner, but none ought to do to another what he would not have done to himself (§ 177); it is self-evident, that they are no less guilty than thieves and robbers, who, by insidious words, cheat one out of his goods\*; or by moving boundaries, using false weights and measures, and other such knavish practices, adventure to take off any thing from one's estate.

\* For all these crimes agree in one common end, this being the design of the thief, the robber and the defrauder, to bereave others of their goods. They agree also with regard to the motive or impelling cause, *viz.* knavery. They agree likewise in the effect, which is making one poorer. Nay the defrauder is sometimes worse than the thief or robber in this respect, that he circumvents one under the mask of friendship, and therefore cannot be so easily guarded against as a thief or robber. They are therefore, with good reason, joined together by that excellent teacher of morals, Euripides in *Helena*, v. 909. who there says, "God hates force, and commands every one to possess the purchase of his own industry, and not to live by plunder. Base and unjust riches are to be renounced with contempt." To which unjust and base riches belongs more especially, as every one will readily acknowledge, whatever one knavishly cheats others of.

## Sect. CCCXXIII.

The last right which belongs to the lord of a *thing, viz. the right of recovering it*, must found *What is another's ought to be restored to him.*

R



an obligation *to restore what belongs to another to its owner*. But hence we conclude, that every one, into whose hands any thing belonging to another comes without his fault, is obliged to take care that it be restored to its owner \*; and therefore, that it ought not to be hid or concealed, but that public notice ought to be given of it, that the owner may have it again, upon making his right to it appear, Deut. xxii. 1. l. 43. § 4. D. de furt. and that the possessor ought to be much more ready to restore it, if the author claim it, or publicly advertise his having lost it. But in both cases equity requires partly that the restitution should not be made at the expence of an honest possessor, and partly that he may not be made richer at another's cost (§ 312.)

\* But even this obligation to restitution does not always take place, because sometimes right reason dissuades from restitution, sometimes the civil laws free the possessor from all obligation to restitution. An example of the first case is a madman claiming his sword deposited by himself; of which Seneca of benefits, 4, 10. Cicero de offic. 1. 10. 3. 25. And like examples are adduced by Ambros. de offic. 1. ult. To the last exception belong *usucapion* and *prescription*. For that these are unknown to the law of nature, seems most certain and evident; because time, which is a mere relation, can, of its own nature, neither give nor take away dominion. And, as we observed above, our dominion cannot otherwise pass to another than by tradition or transferring. Whence it is plain, that one can neither acquire dominion without some deed of the proprietor, nor can the proprietor lose it without some deed of his own. Wherefore *usucapion* and *prescription* owe their origine to civil laws, which introduced both for the public good, l. 1. D. de usurp. & usucap. partly to put a period to the trouble and danger of contests, Cicero pro Cæcin. c. 26. partly to excite men who are indolent and neglectful, to reclaim their goods in due time, by giving them to see the advantages of vigilance above negligence; so that the observation of Isocrates is very just in Archidam. p. 234. "All are persuaded that possessions, whether private or public, are confirmed by long prescription,

tion, and justly held as patrimonial estate." But it does not follow, that whatever many are persuaded of is therefore a precept of the law of nature. And this it was proper to mention, that none may be surprized that we have taken no notice of *usucapion* and *prescription* in treating of property or dominion.

## Sect. CCCXXIV.

But if the true owner do not appear to claim a thing, it is understood to be no body's, and therefore it justly falls to the honest possessor \* (§ 241.) And tho' those who have assumed to themselves the direction of consciences, commonly exhort to give things to the poor when the owner of them does not appear; yet he cannot be called unjust, who, making use of his right, takes to himself a thing morally free from dominion. See Nic. Burgund. ad consu. Flandr. l. 2. n. 1.

\* Besides, the master of a thing alone has the right of excluding others from the use of it. Since therefore the master does not appear, none has this right; and, for this reason, nothing hinders why an honest possessor may not retain it to himself. But because in many countries things free from dominion of any value may be claimed by the people or prince (§ 242), it is plain, that in such countries, where that custom or law prevails, an honest occupant ought to offer things, the master of which is not known, to the magistrates, and may expect from them *μίσθωτρον*, the reward of telling (Grotius of the rights of war and peace, 2. 10. 11.)

## REMARKS on this Chapter.

We have not had occasion for some time to add to our Author, or to make any remarks on his reasonings. And indeed the reason why I choose to translate this Author into our language, is because there is seldom any occasion to add to what he says, and almost never any ground of disputing against him, so orderly, clear, just and full, is his method of proceeding in this most useful of all sciences. But because *usucapion* and *prescription* are usually treated of at greater length by writers on the laws of nature and nations than our Author does; and because this is a proper occasion to explain a little upon the distinctions that are commonly made

by moralists about the dictates of the law of nature and right reason, or conformity to them, let me subjoin the following observations.

1. First of all, it is proper to observe the difference which the Roman law makes between *prescription* in general, and that kind of it which they distinguished by the name of *usucapio*. By *usucapio* they meant the manner of acquiring the property of things by the effect of time. And prescription had also the same meaning; but it signified moreover the manner of acquiring and losing all sorts of rights and actions, by the same effect of the time regulated by law. See l. un. C. de usucap. transf. & Inst. de usucap. and Domat's civil law, in their natural order, T. 1. p. 485. But writers on the law of nature have now very seldom occasion to make use of the word *usucapio*; that of *prescription* being now common by usage, both to the manner of acquiring the property of things, and to that of acquiring and losing all sorts of rights by the effect of time. 2. The chief reasons assigned by the Roman law for the first introducing of property by prescription, are, as Pufendorff of the law of nature and nations hath observed, book 4. cap. 12. § 5. "That in order to the avoiding of confusion, and cutting off disputes and quarrels, it is of great consequence to the public welfare, that the proprieties of things should be fixed and certain amongst the subjects, which would be impossible, should perpetual indulgence be allowed to the negligence of former owners, and should the new possessors be left in continual fear of losing what they held. (Ne scilicet quarundam rerum diu & fere semper incerta dominia essent, l. 1. ff. de usurp. & usucap.) Again, trade and commerce could not otherwise subsist in the world. For who would ever contract with another? who would ever make a purchase, if he could never be secured in the quiet possession of any thing conveyed to him? Nor would it be a sufficient remedy in this case, that if the thing should be thus challenged by a third party, the person from whom we receive it should be obliged to make it good; for after so long a course of time, thousands of accidents might render him incapable of giving us this satisfaction. And what grievous commotions must shake the commonwealth, if at so vast a distance of years, so many contracts were to be disannulled, so many successions were to be declared void, and so many possessors to be ejected? It was therefore judged sufficient to allow such a time, as large as in reason could be desired, during which the lawful proprietors might recover their own. But if through sloth and neglect they suffered it to slip, the *Prætor* might fairly reject their too late importunity. And tho' it might so happen, that now and then a particular person lost his advantage of recovering his goods, utterly against his will and without his fault, only because he was unable to find out the possessor, yet the damage and inconvenience arising from that general statute to some few private men, is compensated by the benefit it affords to the public." It was a judicious reflexion of Aratus of Sicyon

Sicyon in Tully's offices, l. 2. c. 23. "He did not think that possessions of fifty years should be disturbed, because in so long time many things in inheritances, purchases and portions, might be held without an injury to any." 3. Now from the nature of property acquired by prescription, *i. e.* by the effect of time regulated by law, and the reasons upon which the utility, or rather necessity of it is founded, it is plain on the one hand, that whatever is not subject of commerce, cannot be the object of prescription, such as *liberty*; so prime, so essential a blessing; a blessing so much dearer than life, that none can ever be presumed so much as tacitely to have consented to be a slave! Liberty, a blessing, a right in the nature of things unalienable; or to renounce which is contrary to nature, and the will of the author of nature, who made all men free! *Public places, goods belonging to the public, &c.* So, on the other hand, whatever is the object of commerce may be the object of prescription, *i. e.* property in it may be acquired by the effect of time. As every man who is otherwise capable of acquiring dominion, is likewise capable of prescribing; so by this right of prescription we may acquire dominion over both sorts of things, moveable and immoveable, unless they are particularly excepted by the laws. But moveable things may pass into prescription sooner than immoveable, for this reason, that immoveables are judged a much greater loss than moveables; that they are not so frequently made the subject of commerce between man and man; that it is not so easy to acquire the possession of them, without knowing whether the party that conveys them be the true proprietor or the false; and consequently, that they are likely to occasion fewer controversies and suits. Plato's rules for the prescription of moveables are these: "If a thing of this kind be used openly in the city, let it pass into prescription in one year; if in the country in five years: if it be used privately in the city, the prescription shall not be completed in less than three years. If it be thus held with privacy in the country, the person that lost it shall have ten years allowed him to put in his claim, de leg. l. 12." As for the prescription of immoveables, the constitution of Plato's commonwealth was not acquainted with it. It is proper to observe here, that by the civil law prescription has not only respect to property; but it destroys other rights and actions when men are not careful to maintain them, and preserve the use of them during the time limited by the law. Thus a creditor loses his debt for having omitted to demand it within the time limited for prescription, and the debtor is discharged from it by the long silence of his creditor. Thus other rights are acquired by a long enjoyment, and are lost for want of exercising them. See Domat's civil law, &c. T. 1. book. 3. t. 7. § 4. 1. and the Roman laws there quoted. And all the long reasonings in *Thomasius de perpetuitate debitorum pecuniariorum*, and in *Titus's observations on Lauterbach*, obj. 1033, and elsewhere, quoted by the very learned Barbeyrac on Pufendorff, of the law of nature.



and nations, book 4. cap. 12. 1. to shew how far prescription is of natural right, and what civil law adds to it, do not prove, that the law of nature does not permit, may require, that a time should be limited, even for claiming rights, upon the elapsing of which, rights and actions, and what the lawyers call incorporeal things, are prescribed. No one ever pretended, that the law of nature fixed a time which gave a title by prescription with regard to things corporeal or incorporeal. But if security of property and commerce require, that such a time should be fixed, where there is property and commerce, then the law of nature or right reason requires that a time prescribing be fixed so far as security of property and commerce, and quiet possession by honest industry require it, whether with respect to corporeal or incorporeal things. Let me just add upon this head, that whereas it was said above, that things out of commerce cannot be prescribed, yet by the civil law one may acquire or lose by prescription, certain things which are not of commerce; but it is when they are connected with others, of which one may have the property. They are acquired by their connection with such other things. See Domat *ibidem*. Now, if here also it be said, that the law of nature knows no such distinction: the answer is, that the law of nature or right reason acknowledges every distinction which the public utility of a state requires, in order to prevent confusion and quarrels, and to render honest industry secure in the enjoyment of its just acquisitions. For, 4. whatever distinctions moral writers have made about belonging or being reducible into the law of nature, directly or indirectly, immediately, remotely, or abusively; this is plain, that in order to determine what the law of nature or right reason says about a case, the circumstances of the case must be put. For in the science of the law of nature, as well as other sciences, however general the rules or canons may be, yet in this sense they are particular, that they only extend to such or such cases, such or such circumstances. Now, if we apply this general position to the present question, it will appear that prescription is of the law of nature, in the same sense that testamentary succession, or succession to intestates is of the law of nature, *viz.* That right reason is able to determine with regard to prescription, in like manner as with regard to the others, some general rules which equity and public, common security require to be settled about them, where any number of men live in commerce, and property is established, that industry may have due liberty and security. Testamentary succession, and succession to intestates, as we have found them to be regulated by right reason, may be detrimental in some cases to the public, because in some cases, it may be more the interest of the public that any other should succeed to an estate than the heirs according to these general rules with regard to succession, by or without testament. But notwithstanding such detriment that may in some cases happen to the public, general rules about succession are necessary; and none are fitter to be such than those which most encourage industry,

dustry, by best securing the possessor in his right of disposing of his own, the great motive to industry ; and those which determine succession in the way it is properest for the general good, that men's affections should operate towards others. In like manner, whatever detriment may arise in certain cases from the general rule, that time should give a title by prescription ; yet the general rule ought to obtain, because it is the best general rule that can be conceived, the least inconvenient, or rather the best for the security of commerce and property, being the best encouragement to honest industry, by giving the securest possession of its honest acquisitions. In fine, if we ask what the law of nature says about succession, or prescription, or any thing else, we must put a case or enumerate the circumstances ; and therefore, we must either ask what it requires about them where men are in a state of nature, or where men are under civil government. If we confine the questions of the law of nature to the former case (tho' there be distinctions to be made even in that case, as will appear afterwards) yet we limit the science too much, and render it almost useless : But if we extend it to what right reason requires under civil government, we must, in order to proceed distinctly, define the principal end of the civil constitution, and its nature, before we can answer the question ; which will then be twofold. Either, 1. What that particular constitution requires, in consistency with its end and frame, with regard to prescription, for instance, or any other thing ? Or, 2. Whether the end and frame of that constitution requiring such and such rules about prescription for instance, or succession, or any other thing, be a good end, and a good frame, *i. e.* whether all the parts of it, considered as making a particular constitution, do make one consonant to the great general end of all government, *public happiness* ? Thus, if we attend to the necessity of thus stating the meaning of what is called determination by natural law, we will easily see that what is urged from the laws in the Jewish commonwealth against prescription, does not prove that right reason does not require that every state should make some regulation with regard to the effect of time, as to security in possession. For tho' the divine law, which prohibited perpetual alienations for several reasons, abolished by that means prescription, yet the letter of this law being no longer in force, where alienations which transfer the property for ever are allowed, the use of prescription is wholly natural in such a state and condition, and so necessary, that without this remedy every purchaser and every possessor being liable to be troubled to all eternity, there would never be any perfect assurance of a sure and peaceable possession. And even those who should chance to have the oldest possession, would have most reason to be afraid, if together with their possession they had not preserved their titles. See Domat's civil laws, &c. T. 1. p. 483. God, for reasons arising from the constitution of the Jewish republic, forbid the perpetual alienation of their immoveable estates (and not of their goods in general, as some objectors against prescription urge) but all their

laws concerning usury, conveyances, and other things, were necessarily connected together, and with their Agrarian law, (as we shall see afterwards). And therefore there is nothing in the law of Moses that condemns prescription as an unjust establishment; and we can no more infer it from hence to be such (as Barbeyrac well observes, *ibidem*) than we may conclude that the perpetual alienation of lands is odious, and not conformable to natural right. But not to insist longer on this head, it is not only evident that the law of nature for the security of property and the encouragement of industry requires, that a time should be regulated for the effect of possession as to prescribing, in all states which admit of alienations and commerce; but that it requires that this time should be the most equal that can be fixed upon, all the circumstances of a particular state being considered, with regard to the non-disturbance of honest industry, *i. e.* the properest to prevent unjust dispossession on either side, *i. e.* either with respect to the first or the last possessor. And therefore, 4. There is no difficulty with regard to the following general maxims about it. 1. That prescription may affectually proceed, 'tis requisite that the party receiving the thing at the hands of a false proprietor, do obtain this possession by a just title; and consequently, that he act in this matter *bona fide*, with fair and honest intention. For this is necessary to just possession. "A man doth not become a just possessor of a thing barely by taking it to himself, but by holding it innocently." Detaining is otherwise, as Tacitus expresses it, *diutina licentia*, a long continued injustice. Upon this head Pufendorff observes, that according to the civil law, 'tis enough if a man had this uprightness of intention at his first entering on the possession, though he happens afterwards to discover, that the person who conveyed it to him was not the just proprietor. But the canon law requires the same integrity throughout the whole term of years, on which the prescription is built. But Barbeyrac justly takes notice in his notes, "That the maxim in the civil law is better grounded than that of the canon law. And the artifice of the clergy consists not so much in this, that the determinations of the Popes require a perpetual good intention in him that prescribes, as in this, that they will have the goods of the church look'd upon as not capable of being alienated, either absolutely, or under such conditions as will make all prescriptions void." 2. Another necessary condition is, that it be founded on constant possession, such as hath not been interrupted, either *naturally*, as if the thing hath returned in the mean while to the former owner, or hath at any time lain abandoned or forsaken: or *civilly*, as if the owner had been actually engaged at law with the possessor for the recovery of what he lost; or at least by solemn protestations hath put in a salvo to his right. 3. That the space of time during which the prime possessor holds the thing, shall be reckoned to the benefit of him that succeeds in the possession, provided that both the former and the latter first entered upon it with



with honest minds, and upon a just title. For otherwise the prime possessor shall not be allowed to make over his time to the next holder, and consequently, if the former come to the possession by dishonest means, the time he passed in it shall not be computed towards the prescription of the latter, tho' he, for his own part, obtained the possession fairly and justly. See Pufendorff, *ibidem*. 4. Prescription does not run against minors. And if one that is major happens to have a right undivided with a minor, the prescription which could not run against the minor, will have no effect against the major. And the same reason for which prescription does not run against minors, hinders it likewise from running against those whom a long absence disables from pursuing their rights; which is to be understood not only of absence on account of public business, but also of other absences occasioned by accidents, such as captivity. See Domat's civil law, *ibidem*. And for the same reasons, it is highly agreeable to reason, that the time during which a country hath been the seat of war, shall not avail towards prescription. But with regard to minority, it is remarked by Pufendorff *ibidem*, that there may be a case in which the favour of possession shall overbalance the favour of majority. As for instance, suppose it should so happen, that when I want only a month or two of completing my prescription, and it is morally certain that the ancient proprietor will not within that space give me any trouble about the title, and if he should then decease leaving an infant heir, it would be unreasonably hard, if after five and twenty years possession, I should be thrust out of my hold for want of those two months, especially if it be now impossible for me to recover damages of him from whom I received what is thus challenged, as I might have done, had the dispute happened before the goods devolved on the minor. See this subject more fully discussed than it can be done in a short note, by Pufendorff and Grotius. It is sufficient for our purpose to have taken notice of these few things relative to prescription; and to have observed once for all, that unless the determinations of the law of nature be confined to signify the determinations of right reason with regard to a state of nature, (a very limited sense of the law of nature, in which it is hardly ever taken by any writer) every decision of right reason concerning equity, justice, and necessity or conduciveness to the public good of society, or of men having property and carrying on commerce, is a decision of the law of nature. Whatever reason finds to be the best general rule in this case is a law of nature; and in this sense, prescription is of the law of nature, *i. e.* reason is able to settle several general rules about it in consequence of what commerce, the security of property, and the encouragement of industry make necessary. So that where reason is able to make any such decisions, it is an impropriety to say, that thing is not of the law of nature, because some forms and modes relative to it must be determined and settled by convention, or by civil constitution; as the particular



cular spaces of time, for instance, with regard to prescription of moveables and immoveables, &c. must be. For if right reason requires, that time should have a certain effect with regard to property, then is prescription of the law of nature, which by its definition is the acquisition or addition of a property, by means of long possession. But indeed we may safely say, that the law of nature is an absolute stranger to the debates among lawyers, whether prescription should be defined with Modestinus *adjezio*, or *adeptio* with Ulpianus; for all such disputes are mere verbal wranglings, grievously cumbersome to right reason and true science.

## C H A P. XIII.

*Concerning things belonging to commerce.*

## Sect. CCCXXV.

How men  
began to  
want ma-  
ny things.

**A**FTER men had departed from the negative communion of things, and dominion was introduced, they began to appropriate useful things to themselves in such a manner, that they could not be forced to allow any one the use of them, but might set them aside wholly for themselves, and their own use (§ 236). But hence it followed of necessity, that all men had not the same stock, but that some abounded in things of one kind, which others wanted; and therefore one was obliged to supply what was wanting to himself either by the labour of another, or out of his provision. Yea, because every soil does not produce every thing \*, necessity forced men to give to others a share of the things in which they abounded, and which they had procured by their own art and industry, and to acquire to themselves what they wanted in exchange; which when they began to do, they are said to have instituted *commerce*.

\* To this purpose belongs that elegant observation in Virgil, georg. i. v. 54.

*This ground with Bacchus, that with Ceres suits,  
That other loads the trees with happy fruits.*

*A fourth*

*A fourth with grafs, unbidden decks the ground,  
 Thus Tmolus is with yellow faffron crown'd.  
 India black ebon and white ivory bears,  
 And soft Iduma weeps her od'rous tears.  
 Thus Pontus fends her beaver ftores from far,  
 And naked Spaniards temper fteel for war.  
 Epirus for the Eliau chariot breeds,  
 (In hopes of palms) a race of running fteeds.  
 Thus is th' original contract; thefe the laws  
 Impos'd by nature, and by nature's caufe.*

To the fame effect does this poet fing at greater length, georg. 2. v. 199. & feq. Compare with thefe paffages, Varro de re ruftica, 1. 23. Ovid. de arte amandi, 4. v. 578. and above all, Seneca, ep. 87. who having quoted the paffage of Virgil above cited, adds, "Thefe things are thus feparated into different provinces, that commerce amongst men might be neceffary, and every one might want and feek from another." Aristotle urges the fame origine and neceffity of commerce, Nicomach. 5. 8. Polit. 1. 6.

## Sect. CCCXXVI.

Indeed if all men were virtuous, none would have reafon to fear any want. For every one would then liberally give to thofe who wanted of what he had in abundance (§ 221). But fince the love of mankind *hath waxed cold*, and we live in times when virtue is praifed, and ftarves, there was a neceffity of devifing that kind of commerce, by which another might be obliged, not merely by humanity and beneficence, but by perfect obligation, to transfer to us the dominion of things neceffary or ufeul to us, and to affift us by their work and labour.

## Sect. CCCXXVII.

By commerce therefore we underftand the exchange of ufeul things and labour, arifing not from mere benevolence, but founded on perfect obligation. But fince by commerce either work is performed, or dominion and poffeffion is transferred, which obligation ought to be extorted from none without

The ne-  
ceffity of  
com-  
merce.

That  
could not  
be done  
but by  
contracts.

without his knowledge, and against his will (§ 320); the consequence is, that commerce requires the consent of both parties. Now, that consent of two persons concerning the exchange of necessary work, or things which is not of mere humanity and beneficence, but of perfect obligation, is commonly called a *contract*; and therefore it is obvious, that commerce cannot be carried on without the intervention of contracts \*.

\* This is observed by Isocrates, except. adv. Callimach. p. 742. "There is such a force in pacts, that many affairs among the Barbarians, as well as Greeks, are transacted by them. Upon the faith of them we bargain, and carry on commerce. By them we make contracts with one another; by them we put an end to private feuds or public war. This one thing all men continue to use as a common good."

#### Sect. CCCXXVIII.

Most of  
them sup-  
pose the  
price of  
labour  
and things  
fixed.

From the nature of commerce, as it hath been defined (§ 327), it is evident, that it will rarely happen that one will communicate his goods or labour with another gratuitously; but every one will desire something to be returned to him, which he thinks equivalent to the goods or labour he communicates. Wherefore, those who would commute things or labour one with another, must compare things together; which comparison cannot otherwise be made, than by affixing a value to things, by means of which an equality can be obtained and preserved. But a quantity, moment, or value affixed to goods and labour, by means of which they may be compared, is called *price*. And therefore most contracts cannot take place without affixing or settling *price* \*.

\* Hence by the Greeks not only pacts and contracts, but all kinds of commerce are called *συμβολαίς, σύμβολα, συμβόλαια, συμβολαία κοινωνικά*, from the verb *συμβάλλειν*, which signifies to bring together and compare. For those who

who are to interchange goods or labour, compare them together, every one assigns a certain value to his goods or work, and so demands a proportional return. Thus, e. g. if we fix the proportion of gold to silver to be as eleven to one, we affix to each metal a moral quantity or price; which being done, nothing is more easy than to exchange these metals, and keep equality. But we say most contracts suppose the price of things determined, not all. For some are gratuitous, and therefore contracts are rightly divided into *onerous*, when the burden on both sides is equal; *beneficent*, when one obliges himself to do any thing to another gratuitously; and *contracts of chance*, in which fortune so reigns, that one may receive what is done by another sometimes with, and sometimes without any onerous title.

## Sect. CCCXXIX.

This comparison is instituted either between goods and work by themselves, or a common measure is applied, by which all other things are valued. In the first case, *vulgar* or *proper price* takes place, or the value we put upon goods and labour compared amongst themselves. In the latter case, there is a common measure by which we estimate all things that enter into commerce, which is called *eminent price* \*; such as is money amongst us. But in both cases equality is required.

\* Hence Aristotle justly defines money; "A common measure to which all things are referred, and by which all things are estimated," Nicomach. 9. 1. And hence all things which enter into commerce are said to be purchasable by money. This alone is reprehensible, that men should estimate things by money, which do not enter into commerce; such as, justice, chastity, and conscience itself. And against this venality the antient poets have severely inveighed. Horat. serm. 2. 3. v. 94.

Omnis enim res,  
Virtus, fama, decus, divina humanaque, pulchris  
Divitiis parent: quas qui construxerit, ille  
Clarus erit, fortis, justus, sapiensve etiam, & rex,  
Et quidquid volet.



So Propertius, 3. 10.

*Aurea nunc vere sunt sæcula, plurimus auro  
Venit honos, auro conciliatur amor.  
Auro pulsa fides, auro venalia jura,  
Aurum lex sequitur, mox sine lege pudor.*

Many such like passages are to be found among the ancients, as in Petronius's satyricon, c. 137. and in Menander, of whom we have this elegant saying concerning a rich man preserved;

*Opta modo, quidquid volueris: omnia evenient:  
Ager, domus, medici, supellex argentea,  
Amici, judices, testes: dederis modo.  
Quin & deos ipsos ministros facile habebis.*

Sect. CCCXXX.

How vulgar or proper price is fixed.

That in the earlier times of the world men knew nothing but the *proper* price of things, is plain, because eminent price could not have been instituted without the consent of many; but every one imposed vulgar price upon his own work and goods at his pleasure. But since that is done with intention, and in order to purchase by them what one wants from another (§ 325); it is plain, that regard ought to be had in fixing the price of goods and labour to others from whom we want certain things; and therefore they ought to be estimated at such a rate, as it is probable others will be willing to purchase them \*.

\* For if we suppose the Arabians to estimate their incense and spiceries at such a price, that they would not give above one dram of them for six hundred bushels of corn, they would never get corn at that price, because none would exchange it upon so unequal terms, nor would others get their spices; and thus there would be a stop to commerce, for the sake of which price is devised. Since therefore the means ought to be as the end, the consequence is, that price ought to be fixed so that commerce can be carried on; and for this reason, in settling it regard ought to be had to others from whom we would purchase any thing.

Sect.

Sect. CCCXXXI.

Now, since work or things ought to be valued at such a price as it is probable others from whom we want any thing will purchase them ; it is obvious, that sometimes the necessity and indigence of others will raise the price of things \* ; and sometimes the scarcity of the thing will raise it ; and that regard ought likewise to be had to workmanship, the intrinsic excellence of the thing, the labour and expence bestowed upon it, the danger undergone for it ; and, in fine, to the paucity or multitude of those who want the goods or labour, and various other such circumstances.

\* It is true indeed, that the most necessary things have not always the highest price, kind providence having so ordered it, that the things which we can least dispense with the want of are abundant every where ; and those things only are rare and difficult to be found, which are not necessary, and which nature itself does not crave, as Vitruvius justly philosophizes, Architect. 8. præf. But if necessity be joined with scarcity, *e. g.* if there is every where a dearth of corn, the price of it rises very high, as experience tells us. And then happens, as Quintilian says, declam. 12. “ In magna inopia, quidquid emi potest, vile est.” “ In great scarcity, what can be bought is cheap.” The seven years famine in Egypt was an instance of this, Gen. xlvii. 14. & seq.

Sect. CCCXXXII.

It may be objected, that men are accustomed to put an immense value upon their own goods, much greater certainly than any one will purchase them at, whether it be that the author renders them precious, or their rarity, or some remarkable event which they recal to our memory. But since we are now treating of the duties which ought to be observed in commerce, and that kind of price is not commonly considered in commerce, but only

ly in repairing damages \* (§ 212), it is evident that this price does not destroy our rule.

\* Fancy or affection is of such a nature, that it cannot pass from one to another; and therefore it will be no motive to one to purchase a thing from me at a greater price, because it is agreeable to me on account of its serving to recal something to my memory that gives me pleasure. But this however is but generally true: for sometimes in commerce even this price is considered; as when, 1. The affection to a thing is common on account of the author or artist, or of its singular beauty and rarity. Hence the statues of Phidias, and the more finished pictures of Apelles or Parrhasius, sold at a higher than the vulgar or proper price, because they deserved the common esteem of all mankind. 2. If the purchaser has a greater affection to a thing than the possessor; *e. g.* if my possession would greatly better another's, and he therefore desire, like him in Horace, who thus speaks, *serm.* 2. 6.

*O si angulus ille*

*Proximus accedat, qui nunc denormat agellum!*

### Sect. CCCXXXIII.

Why eminent price was invented.

But since commerce was instituted among men that one might supply his wants out of another's stock or labour (§ 326), and price was devised for no other reason but that equality might be obtained in the exchange of goods or labour (§ 328); it could not but happen very often, that one might not have a very great abundance of what another might want, that one might despise what another would desire to exchange, and that the value of things which persons might desire to commute, might be so uncertain and variable, that some of the parties must run a risk of loss; and that the things to be exchanged might be of such a bulk, that they could not be commodiously transported to distant places, or could not be taken proper care of in the journey.—All which inconveniencies not being otherwise avoidable, necessity itself at last devised some eminent price

price that all would receive, and the proportion of which to goods could easily be determined \*.

\* This is observed by Paullus J.C. l. 1. D. de contra empt. who describes the origine of buying and selling as above. Aristotle likewise gives much the same account of the matter, ad Nicomach. § 8. and Polybius l. 6. upon which passages Perizonius hath commented with much erudition, de ære gravi § 2. p. 6. & seq. as has Duaren. upon that of Paullus animad. l. 6.

## Sect. CCCXXXIV.

The end of money, or eminent price, requires that the matter chosen for that purpose be neither too rare, nor too common, nor uselefs, and in itself of no price\*; that it be easily divisible into small parts, and yet not too brittle; that it may be easily kept and laid up, and easily transported to any distance; because, if it was too scarce, there would not be a sufficient quantity of it to serve the uses of mankind; and if it was too common, it would be of no price or value, in which case, it would not be received by all; if it could not be easily divided into any portions, equality in commerce could not be obtained by it; and yet, if it was too brittle, it would easily wear out by use, and thus its possessors would be impoverished. In fine, if it could neither be conveniently kept, nor easily transported, the same inconvenience which rendered commerce difficult before the invention of it, would still remain (§ 333).

\* Wherefore Aristotle justly calls Money, Nicomach. 5. 8. "a surety, which if one carries along with him he may purchase any thing." Whence Pufendorff of the law of nature and nations, v. 1. 13. justly reasons thus: "As we accept a man of known credit and value, and not every common fellow for a surety, so no man would part with his goods, which perhaps he had acquired with great labour and industry, for what he might meet with any where, as a handful of dust and sand; it was necessary

S

there-



therefore, that money should consist of such a matter, as might be convenient for keeping, and by reason of its scarcity, should have the value of many things crowded and united with it."

## Sect. CCCXXXV.

Why the  
nobler  
metals  
are used  
to this  
purpose.

But because these properties belong to no other matter but the more precious kinds of metals, as gold, silver and brass; these metals are therefore applied to this use, and hence coined money of various weights and sizes hath seemed to most civilized nations the properest substance to answer the ends of commerce. If any people hath thought fit to give an eminent price to any other matter \*, it hath been done out of necessity, and for want of money, and with this intention, that the scarcity or difficulty being over, every one might receive solid money for the symbolical; or such money hath only been used by a nation within itself, and was not proper for carrying on commerce with foreign nations.

\* Thus the Carthaginians used instead of money something I know not what, fastened to a bit of skin, and marked with some public stamp, *Æschin. dialog. de divit. c. 24. p. 78. edit. Petri Horrei.* The Lacedæmonians an useles lump of iron, *idem ibid. p. 80. Plutarch. Lycurg. p. 51.* other nations used shells, *Leo Afr. l. 7.* others grains of corn, kernels of fruit, berries, lumps of salt, *Pufendorff. § 1. 13.* Examples of paper, leather, lead, and other things made use of for money in besieged towns, are to be found (not to mention instances from more modern history) in *Polyænus Strategem. 3. 10.* and there *Masui. p. 274.* *Seneca de beneficiis, 5. 14.* But all such money used in barbarous nations, is capable of carrying on but a very small trade among themselves. And symbolical money used in public calamities, is really to be considered as tickets or bills, which the supreme magistrate obliges himself to give ready money for, when the distress is over. Thus *Timotheus* is said by *Polyænus* to have persuaded merchants to take his seal for money, to be received upon returning it.

Sect.

## Sect. CCCXXXVI.

Tho' it belong to the supreme power in a state <sup>What</sup> to fix the value of money (as we shall shew after- <sup>price is</sup> wards in the proper place) ; yet, as with respect <sup>to be put</sup> to vulgar or proper price, regard ought to be had <sup>on money.</sup> to others from whom we would have any thing in exchange (§ 330) ; so it is evident, that a value ought to be put upon money, at which it is probable other nations, with whom we are in commerce, will not refuse it ; and therefore the value of it ought to be regulated according to that proportion of one metal to another, which is approved by neighbouring civilized nations, unless we would fright other nations from having any commerce with us, or be ourselves considerable losers.

\* For if we put too high a value on our money, foreign nations will either not care to have commerce with us, or they will raise the price of their commodities in proportion to the intrinsic value of our money. But if we put a less value on our money than neighbouring nations, nothing is more certain, than that our good money will remove to our neighbours, and their bad money will come to us in its room, so that none will know what he is worth. Hence it follows, in the more civilized nations, the proportion of gold to silver varying according to times, and being sometimes as twelve, sometimes as eleven, sometimes as ten to one, the price of gold must be sometimes higher and sometimes lower. (See our dissertat. de reduct. monet. ad just. pret. § 24.) Wherefore the Arabians could not but be great losers, who, according to Diodorus Siculus, Bibliothec. 3. 45. received for brass and iron an equal weight of gold ; or, as Strabo, Geogr. 16. p. 1124. paid for brass three times the weight of gold, for iron twice the weight, and for silver ten times the weight, partly through their ignorance of arts, and partly through their indigence of those things which they bartered for it, that were more necessary to them. See what is related of the Peruvians by Garcillass. de la Vega dans l'histoire des Yncas, 5. 4. p. 425.

## Sect. CCCXXXVII.

The most  
antient of  
all con-  
tracts be-  
fore the  
invention  
of money  
was bar-  
tering.

That we may now come to the *contracts*, by means of which commerce is carried on (§ 327), it is obvious to every one, that one kind of contracts took place while the proper price of things only was known, and money or eminent price was not yet in use (§ 330), and that after money was invented another kind took place, and that some were known both after and before money was in use. Among those which took place before money was in use, the first and principal is *bartering*. For in the first ages of the world commerce was only carried on by exchanging or bartering commodities and labour; and therefore bartering is the most antient of contracts; and it continued still to be in use in many nations, after money was in use, as well as where no price was yet put upon gold, silver, and brass\*.

\* So it was among our ancestors the ancient Germans, Tacitus de moribus Germ. c. 5. who observes, that in his time the Germans who lay nearest to the Roman provinces, had conceived some desire of money. Justin, hist. 2. 2. relates the like of the Scythians. Pomponius Mela of the Satarchi, a People in the European Scythia, de situ orbis, 2. 1. Strabo of the Spaniards, Geogr. 3. p. 233. The same is yet practised by several nations in Asia, Africa and America: And it is the less to be wondered at with respect to barbarous countries, since the Greeks and Romans, long after the invention of money, carried on commerce in no other way but by barter. We have a noted example of it among the Greeks in Homer, Iliad 7. v. 482. and among the Romans in Plin. nat. hist. 18. 3. 33. 1.

## Sect. CCCXXXVIII.

How ma-  
ny sorts  
there are  
of it.

*Bartering* is giving something of our own for something belonging to another; which, because it may be done two ways, *i. e.* either with, or without estimating and putting a certain price upon the things

things exchanged, it therefore follows, that when no estimation is made, is called *simple bartering*; and when an estimation is made, and price fixed, it is called *estimatory bartering*. The former is somewhat like mutual donation, and the latter somewhat like buying and selling, l. 1. C. de permut. l. 1. § 1. D. de contr. emt. For tho' Pufendorff of the duties of a man and a citizen, l. 15. 8. asserts that mutual donation is quite a different business from bartering, because it is not necessary that equality should be observed in it, yet there is no difference in this respect; for neither is equality observed in *simple bartering* \*.

\* For in it, each of the contracting parties estimates not his own but the other's; and not at the just price others would put upon it, but according to his fancy; and so there is in such a contract no equality of goods, but of affection or fancy only. Because as often as the affection of the acquirer is greater than that of the possessor, regard is had in commerce, as we have already said (§ 332), to price and affection. The commerce between Glaucus and Diomedes in Homer, exchanging their arms, furnishes us with an example, Iliad 2. v. 236.

*Aurea æreis, centena novenariis, &c.*

Of which barter Maximus Tyrius, Dissert. Platon. 23. very elegantly observes, "Neither did he who received the gold get more than he who got the brass. But both acted nobly, the inequality of the metals being compensated by the design of the exchange."

#### Sect. CCCXXXIX.

Because *simple barter* is somewhat like mutual donation, and it is not necessary that equality should be observed in it (§ 338), it is plain neither of the contracting parties can have any reason to complain of being wronged, unless the other use force or guile (§ 322. and 321.) nor is such a contract null on account of injury, except when he who exchanges a more precious thing for a thing of no value, has not

What is just with respect to simple barter.



the free disposal of his goods (§ 317); and more especially, if the thing thrown away in such a manner, be of such a kind that it cannot be alienated without doing something base, unless the acceptor himself be perchance guilty of equal baseness.

\* Hence it may be doubted, whether the exchange made by Jacob and Esau, the latter of whom shamefully sold his birth-right for pottage, Gen. xxv. 29. would have been valid *in foro humano*. For tho' Esau was very blame-worthy in setting so small a value upon the prerogative God had favoured him with, and he be on that account very justly called by the apostle, Heb. xii. 6. *a profane person*; yet Jacob acted no less basely in taking advantage of his brother's hunger, to defraud him of so great a privilege (§ 322). For what Esau could not sell without a crime, that his brother could not buy without a crime; and it was his duty to dissuade his brother from such folly, and not to abuse his weakness. But many things of this sort are admirable in their typical sense, which are scarcely defensible by the rules of right reason.

#### Sect. CCCXL.

What is  
just with  
regard to  
estimator  
permuta-  
tion.

In *estimatory* permutation or barter, since here a price is put upon the things to be exchanged, (§ 338), equality ought certainly to be observed, and neither ought to wrong the other; nor is the barter valid if either be circumvened, unless the injury be of so little moment that it be not worth minding\*.

\* For the vulgar or proper price of things is either legal or conventional; the former of which is fixed by law, or the will of superiors, the latter by the consent of the contracting parties. Now, seeing the former is fixed, and consists, as it were in a point, but the latter is uncertain, or admits of some latitude; in the former case one is justly thought to be wronged who does not receive the full price; in the latter case, the damage ought to be of some consideration to invalidate the contract *in foro humano*. "For, as Seneca says of benefits, 6. 15. what's the mat-  
ter

ter what be the value of a thing, if the price be agreed upon between the buyer and the seller? The price of every thing is temporary. When you have highly praised things, they are just of so much value and no more than what they may be sold for." Hence in formed governments, we may observe that a contract is only annulled when the injury is enormous, as by the Roman law, when one of the parties was wronged above half the price, l. 2. C. de rescind. vendit.

# Sect. CCCXLI.

But men not only barter commodities, but likewise Of the work for work, or work for other considerations; <sup>contracts,</sup> whence these contracts, *I give that you may do; I do* <sup>I give that</sup> *that you may give, and I do that you may do;* <sup>you may</sup> which <sup>do: I do</sup> being of the same kind and nature with barter, or <sup>that you</sup> reducible to barter, *simple* or *estimatory* (§ 338), <sup>may give;</sup> the same rules already laid down concerning them <sup>I do that</sup> *you may* (§ 338) must, it is evident, be observed in those <sup>do.</sup> contracts. For either one's work is estimated with respect to another's work or goods, (which kind of negotiation is called, not unelegantly, by Ammian. Marcell. hist. 16. 10. *pactum reddendæ vicissitudinis*) or work for goods is done without any estimation \*. And in the former case equality ought to be observed, and damage of any considerable moment ought to be repaired; but in the latter all complaints about wrong or hurt are to no purpose.

\* Such was the promise of Agamemnon in Homer, Iliad. 10. v. 135.

*If gifts immense his mighty soul can bow,  
Hear all ye Greeks, and witness what I vow:  
Ten weighty talents of the purest gold,  
And twice ten vases of refulgent mold;  
Seven sacred tripods, whose unsully'd frame,  
Yet knows no office, nor has felt the flame;  
Twelve steeds unmatch'd in fleetness and in force,  
And still victorious in the dusty course, &c.*

All this to pacify Achilles.— Whence it is plain, that it was a practice for one to stipulate with one for inestimable

services, and to promise him for them whatever he thought would be most agreeable, without any regard to equality.

Sect. CCCXLII.

Contract  
of loan.

There are other contracts by which commerce was carried on before the invention of money, *viz.* all gratuitous ones, by which, what before was only owing to one by imperfect right, or by mere love and benevolence, became due to him by perfect right, such as a contract of loan. For since we are obliged to what was called (§ 228) *officiousness*, we are likewise bound to accord to one who may want it, the use of any *commodity* belonging to us not consumable, with his obligation to restore it; *i. e.* to lend, or give in loan\*. But the love of mankind becoming cold, it could hardly be hoped that one would do this service to another spontaneously (§ 326), and therefore necessity forced men to invent a kind of contract, by which men might be obliged by perfect right thus to grant the use one to another of their not consumable goods.

\* Loan therefore is a perfect obligation to allow another the use of something belonging to us, on condition of his restoring it to us in specie, gratis. And hence it is plain, that in natural law a loan scarcely differs from (*precarium*) what is granted to one upon his asking it, between which there is however some difference in civil law. Hence also may this question easily be decided, "Whether a contract of loan derives its essential obligation from the consent of the contracting parties, or from the delivery of the thing?" For tho' by the law of nature, consent alone to the use of a thing obliges (§ 327); yet it is not a loan till the thing be delivered; because he to whom the promise of a loan is made, before he hath received the thing thus promised, is not obliged to restore it in specie: it is only a pact or agreement about a loan. But that there is a difference between these two is plain from hence, that the borrower, by loan, is obliged to restore the thing, but by a compact about lending, he who promises to lend is obliged to

to give the thing in loan : so that different obligations arise from these two negotiations.

Sect. CCCXLIII.

Now, because the use of a thing is granted by loan, <sup>The du-</sup> on condition of the borrower's restoring it in species <sup>ties of the</sup> \* (§ 342), the former is obliged not only not to apply <sup>borrower.</sup> the thing borrowed to other uses than those for which it was given, but likewise to apply it to these uses with the greatest care and concern; and therefore, when the use is over, or when the proprietor re-demands it, to restore it to him in species, and if it hath suffered any damage by his fault, to repair it; but he is not bound to make up fortuitous damages, unless he had voluntarily so charged himself\* (§ 106); nor can he demand for any expenses he may have laid out upon it, unless they exceed the hire to be paid for the letting of such a thing.

\* Grotius of the rights of war and peace, 2. 12. 13. was the first who distinguished here, whether a thing would have perished in like manner in the hands of its proprietor or not; in the latter of which cases, at least, he thinks the loss should fall upon the borrower: And Pufendorff of the law of nature and nations, 5. 4. 6. is of the same opinion: So likewise Mornac, ad l. 1. C. commod. But since accidental or fortuitous events, arising merely from providence, are imputable to no person (§ 106), they certainly cannot be imputed even to a borrower. Nor is the divine law repugnant to this sentence, Exod. xxii. 14. For it cannot be understood otherwise than when the borrower is in fault. See Jo. Clerici Comment. in Exod. p. 110.

Sect. CCCXLIV.

Again, the love of humanity obliges every one <sup>The con-</sup> to promote the good of others to the utmost of his <sup>tract of</sup> power (§ 216); but since we have only an imperfect <sup>deposit.</sup> right to demand such good offices, it is often our interest to stipulate with others, in order to their being



being obliged by a perfect right to take the custody of our things deposited with them; and this is the intention of the contract of *deposit* or *charge*, by which we understand a perfect obligation upon another to keep gratis our things intrusted to his faith, and to restore them to us upon demand in species \*.

\* Nothing was more sacred among the ancients than this contract, because the deponent reposes the greatest trust and confidence in the trustee; and nothing can be more base than to deceive a friend under the mask of friendship (§ 322). Hence the religious veneration paid to such trusts, not only among the Hebrews, of which see Exod. xxii. 7. and Josephus's antiquities of the Jews, 4. 8. 38; but among the Greeks likewise, and several other Pagan nations, as we may learn from the story of Glaucus in Herodot. 6. 87. and from Juvenal, Sat. 13. v. 15. who there calls it *depositum sacrum*. Hence it is not to be wondered, that the ancients pronounced such terrible curses against those who dared to refuse to give back their charge; and looked upon them as no less infamous, and equally to be punished with thieves. See what is said on this subject by Gundlingius in Gundlingianis, part. 2. diss. 8.

#### Sect. CCCXLV.

The duties of the trustee. It is plain from the definition of a *charge*, (§ 344), that the trustee is obliged to the most watchful custody of his charge, not so much as to untie it, or take it out of its cover, much less apply it to his use, without the master's consent; in which case, the contract becomes not a charge, but contract of loan or use. And that the trustee is obliged to restore the thing intrusted to his keeping to its owner whenever he calls for it, unless right reason dissuade from so doing (§ 323); and consequently he is not only bound to make satisfaction, but is likewise worthy of severe punishment, if knowingly and guilefully he refuses to restore it, more especially, if it was lodged in his trust in a case of distress \*.

\* For

\* For because regard is had to all circumstances in imputation (§ 113), therefore such a crime is so much the more vile and odious, in proportion as he is more inhuman, who not only cheats under the cloak of friendship (§ 322), but cruelly adds affliction to the afflicted. This is warmly urged by Hecuba against Polymnestor, who, when Troy was destroyed, killed Polydorus, son to Priam, that he might have the gold entrusted with him to himself, Hecub. v. 1210, & seq. Euripides.

## Sect. CCCXLVI.

Again, the love of humanity ought to excite every one to assist another as readily as himself (§ 216); but because one cannot be sure of that from another, there is need of a contract, by which we may oblige one to manage our business which we have committed to him diligently, without any reward \*. Now this contract we call *commission*, as when one without his knowledge, undertakes another's business, or orders and manages it for him voluntarily gratis, he is said *negotia gerere*, to take another's business upon him of his own accord.

\* It is a true and solid remark of Noodt, in his probabilia, 1. 12. that a mandate or commission in ancient times, had not perfect obligation, but that the proxy or person commissioned, was only bound by the laws of humanity and friendship, to the diligent and honest execution of his commission: and that the symbol used was giving the hand; whence it is not unlikely that this contract was called *Mandatum*, Isidor. orig. 4. 4. You may see examples of thus giving hand to proxies in Plautus Capt. 2. 3. 82. where the youth says,

*Hæc per dextram tuam, te dextera retinens manu,  
Obsecro, infidelior mihi ne fuas, quam ego sum tibi.*

And in Terence Heaut. 3. 1. v. 84.

*Cedo dexteram: porro te idem oro, ut facias, Chreme.*

Anciently therefore, this whole business depended upon integrity, and not laws, till benevolence becoming very cool among mankind, necessity obliged them to make it a contract, that thus the proxy might be laid under a perfect obligation

obligation of executing his commission diligently. And the case is the same with regard to all the other gratuitous contracts.

## Sect. CCCXLVII.

The duties of a proxy.

Wherefore, since a proxy undertakes another's business *committed* to his care (§ 346), but it depends upon the master's pleasure what, and how far to commit; it is plain, that the person giving the commission, either gives him full power to do all as he shall judge proper, or circumscribes the person commissioned within certain limits; or at least, by way of counsel, suggests to him what he would have him do. In the second case therefore, the proxy cannot exceed the bounds of his commission. In the first, he is only obliged to answer for knavery. In the third, that he may expedite his commission by doing something equivalent. But, in all these cases, the procurator or proxy is obliged to render account of his management, in consequence of the very nature of a commission \*.

\* To this belongs that noted passage of Cicero, pro Q. Rosc. c. 38. "Why did you receive a commission, if you was either resolved to neglect it, or to make your own advantage of it? Why do you offer your service to me, and yet oppose my interest? Get away: I will transact the affair by another. You undertake the burden of an office to which you think yourself equal: an office which does not appear heavy to those who have any degree of weight or sufficiency in themselves. Here there is a base violation of two most sacred things, faith and friendship. For one does not commission another unless he have confidence in him, nor does one trust a person except he have a good opinion of his integrity. None therefore but the most abandoned villain would both violate friendship, and deceive one who could not have been hurt had he not trusted to him."

## Sect. CCCXLVIII.

As like-  
wife of  
him who

He also who takes *another's business* upon him without commission, without being called to do it,  
of

of his own accord, and gratis (§ 346), by so doing <sup>takes another's business upon him</sup> binds himself to manage it to the best advantage, and to bestow all possible care about it, and therefore to render account, and to stand to all the losses <sup>uncalled.</sup> that may happen by his fault.

\* To the cause or author of a deed are it and all its effects imputable (§ 105). Since therefore, he who takes upon him another's business is the author of the administration (§ 346), to him are all the consequences of the administration justly imputable. But the consequences of administration are giving account and repairing damages incurred by the fault of the administrator. And therefore he who takes upon him the administration of another's business is obliged to give account, and to make reparations for damages proceeding from any fault in him. So that there is no need of deriving this obligation, with the lawyers, from feigned or presumed consent, since such an administrator as hath been described, by his own deed in undertaking another's business, tacitely indeed, but truly obliges himself to all that hath been said.

Sect. CCCXLIX.

These then are the contracts which took place, The money or eminent price not being yet found out: <sup>The duties of a lender, a deponent, a person giving a proxy, and of one whose business is managed by another without commission.</sup> and with regard to them all, we have one thing yet to observe, which is, that because in the three last, one obliges himself to give and do something gratuitously, but not to suffer any hurt on another's account, in them therefore no one ought to suffer by his good offices, and consequently he who lends is obliged to restore to the borrower expences that are not immoderate (§ 343), and the deponent is obliged to restore to the trustee all necessary charges; and the person giving a commission, or the person whose affair is undertaken and managed without his commission, is obliged to restore necessary or useful charges; and they are all of them bound to repair all the damages that may have been incurred for their sake, or on account of managing their affairs



fairs by the borrower, the trustee, the proxy, or the voluntary undertaker, without their fault \*.

\* We say those damages ought to be repaired which a proxy hath suffered by managing another's affairs. For it is not enough that he hath incurred any accidental damage on occasion of his having undertaken another's business: because none being obliged to answer for accidents, a person giving commission to another is not. Wherefore, if a proxy, while he is expediting his commission, is robbed by highwaymen, or falls into a dangerous sickness, the loss he may thus providentially suffer is not to be imputed to his constituent. "For such accidents, says Paullus, l. 26. § 6. D. mandati, are imputable to fortune, not to commission." See Grotius of the rights of war and peace, 2. 14. 13. But it is otherwise with respect to one commissioned by a prince to do some public business in a foreign country. For he to whom the glory of obeying is the chief reward, ought to be indemnified by the public. See Hubert. Eunom. ad l. 26. D. mandati. Pufendorff of the law of nature and nations, 5. 4. and Hert. de lytro, 2. 10.

#### Sect. CCCL.

The contracts which took place after the invention of money, buying, selling, renting, hiring.

We now go on to another kind of contracts which began to take place when money was invented, the chief of which are *buying* and *selling*, *renting* and *hiring*. The first is a contract for delivering a certain thing for a certain price. The second is a contract for granting the use of a certain thing or labour at a certain rate or hire. But as the *price* in *buying* is the value of the thing itself in money, so *hire* is the *value* of the use of a thing, or of labour in money; and therefore, from the very definitions, it is plain that buying and selling, renting and hiring, now-a-days, require payment in money, and in that are different from bartering, and the other contracts defined above; "*I give that you may give; I give that you may do; I do that you may give, and I do that you may do* \*." Yet they all agree in the chief points, and have almost all the same common properties or effects.

\* For

\* For tho' estimatory barter bears some affinity to buying and selling (§ 338), yet it really differs from it in this respect, that in selling, money intervenes, but in estimatory barter, an estimated thing is given for another thing. Whence it is very manifest, what ought to be determined concerning the ancient controversy between the Sabiniani and the Proculiani, whether price in buying and selling could only consist in money, or might consist in other things. Upon which see, besides the learned commentators upon § 2. de empt. vend. instit. V. C. Gottf. Mascou. de sect. Sabin. & Procul. 9. 10. 1. & seq.

## Sect. CCCLI.

Since therefore this is the nature of the contract *buying and selling* (§ 351), that a thing is delivered at a certain price; the consequence is, that the buyer and seller ought equally to know the thing; and therefore the seller ought not only to point out to the buyer all its qualities, all its imperfections, faults or incumbrances, which do not strike the eyes and other senses\*; but he is likewise bound to suffer him to examine it with his eyes, and by all other means; so that of things belonging to the taste, the sale is not perfect till they are tasted; and of others which stand in need of other trials, the sale is not perfect till the trial hath been made: And therefore, if what Euripides says be true with respect to any contract, it certainly holds with regard to this chargeable one, "Light is necessary to contractors." Cyclop. v. 137.

The seller is obliged to tell the qualities of the thing he sells to the buyer.

\* There are faults and imperfections which are so glaring, that it would be needless to point them out; so that if one is deceived with respect to such faults, he deservedly suffers by his own blindness and heedlessness; to which case belongs the contest between Marius Gratidianus and C. Sergius Orata in Cicero, off. l. 3. 16. But the Roman laws, that men might be more firmly bound to do this good office one to another, ordained that all the faults should be told in selling which were known to the seller, and appointed a punishment for those who hid any, or did not discover them. "For tho' the twelve tables, says Cicero, ordered

ordered no more than this, that the feller should be bound to make good those faults, which were expressly mentioned by word of mouth in the bargain, and which whoever denied was to pay double damages, the lawyers have appointed a punishment for those, who themselves do not discover the faults of what they sell: For they have so decreed, "That if the feller of an estate, when he made the bargain, did not tell all the truth in particular, that he knew of it, he should afterwards be bound to make them good to the purchaser," *de off.* 3. 16. The same author, *c.* 12. disputes, "Whether an honest merchant bringing, when corn was scarce at Rhodes, a large quantity thither from Alexandria, and withal knowing, that a great many ships, well laden with corn, were in the way thither from the same city, was bound to tell the news to the people of Rhodes, or might lawfully say nothing of it, but sell his own corn at the best rates he could? of which question see Grotius of the rights of war and peace, 2. 12. Pufendorff of the law of nature and nations, 5. 3. 4.

## Sect. CCCLII.

Neither of  
the parties  
ought to  
be wrong-  
ed.

Hence it is also plain, that equality between the thing sold and the price paid, ought to be observed (§ 329); and therefore every injury ought to be repaired, whether it be done by guile or force, or be occasioned by a justifiable mistake \*. Yet here we ought to call to mind what was before observed, that the wrong ought to be of some considerable moment, because here price does not consist as it were in a point, but admits of some latitude, and it would justly be reckoned being too sharp, and opening a door to endless suits and contentions, to rescind a contract for every small loss (§ 340).

\* If it should be invincible, involuntary and inculpable (§ 107): For otherwise, if one buys any thing at a certain price, which he hath not seen nor sufficiently examined, his error ought to fall on himself, if the seller used no guile to deceive him, (which we know Laban did to Jacob in buying his wife, *Genesis* xxix. 23.) because he suffers.

suffers justly for his mistake, who might not have mistaken, had he not been supinely negligent.

## Sect. CCCLIII.

It is disputed to whom the *loss* and *gain* belongs <sup>To whom</sup> while the *thing sold* is not delivered; whether it <sup>the loss</sup> immediately passes to the buyer so soon as the price <sup>and gain</sup> is agreed upon, or whether it still belongs to the <sup>belong be-</sup> seller while the thing is undelivered? What the <sup>fore de-</sup> Roman law has determined in this case is well known; nor will any one expect that we should insist long upon the reasons of that decision. To us, who are now only enquiring into the determination of the law of nature, it seems incontrovertible, that the owner or master is to stand all chances (§ 211); nor does it appear less certain to us, that what proceeds from delay or fault, is not mere chance; and therefore he, who by any deed damages another, is obliged to repair that damage (§ 211). Whence it follows, that because the buyer may, by the law of nature, be master of the thing bought without delivery (§ 275), the risk, after the sale is completed, immediately falls upon the buyer, unless the seller be guilty of any delay in delivering it, or some other fault \*.

\* Pufendorff's opinion (of the law of nature, &c. 5. 5. 3.) is much the same, but more obscurely told, where he distinguishes whether a certain day was fixed for the delivery or not, and if fixed, whether it be elapsed or not. For he thinks it most equal that the seller should run the risk till the term is elapsed; but that, the term being elapsed, if the thing perishes, it perishes to the buyer. But since the buyer is master, by the law of nature, without delivery, and the term being elapsed, it may not be always the seller that is in delay, but that may often be the fault of the buyer; we think in general the risk belongs to the buyer, in whose power it was to have received the thing immediately, upon paying down the price. But if he hath fulfilled the conditions of the contract on his side, or if he is ready to fulfil them, the seller who delays the delivery, deservedly



deservedly runs the risk, whether a certain term for delivery was agreed upon or not.

## Sect. CCCLIV.

Whether the decision of the Roman law is agreeable to the law of nature?

Now, because the buyer immediately becomes master or proprietor even before delivery, and therefore ought to stand to all chances (§ 353); the consequence is, that the doctrine of the Roman lawyers concerning the risk of a thing sold is true, but is not so consistent with their own principle, which denies that the dominion passes to the buyer without delivery; that since the proprietor hath the right of all the fruits, accessions, and other advantages of what is his own (§ 307), he hath also a right to all the gains of a thing sold to him; but so, that this rule shall then only take place, if the buyer hath any way satisfied the seller for the price\*; because otherwise he would, at the same time, have the thing and the price, and thus he would be made richer at another's detriment (§ 257.)

\* But not only he seems to have given satisfaction as to the price, who hath paid the money, but he also to whom the seller trusts, having, *e. g.* stipulated to himself an annual interest. For tho' this is the most simple kind of contract, in which the price being paid down, the thing is immediately delivered, *i. e.* if men merchandize *Græca fide*, which was the only kind of commerce Plato allowed in his commonwealth *de legibus*, l. II. yet that cannot always be done, and experience shews us, that commerce consists more in credit than in ready money.

## Sect. CCCLV.

When the risk belongs to the seller.

But since a thing justly perishes to the loss of the seller when he is guilty of delay in delivery, or of any other fault (§ 353), it is manifest that the buyer is exempt from all risk, if the seller, when he offers him the price, refuses to give him full possession of the thing sold, or cannot do it; and likewise, if it can be proved to have been owing to

to the feller's fault or negligence, that the thing sold perished either in whole or in part.

Sect. CCCLVI.

Buying and selling is done on purpose that a thing may be delivered for a certain price (§ 278). But since he who transfers dominion to another for an onerous cause, as, for a certain price, is obliged to warranty (§ 274), the feller must be obliged to warrant the buyer, if the thing be evicted from him upon account of any cause antecedent to the contract; but not, if, after the sale, something shall then happen, on account of which one is deprived of his property, or if it be taken from him by accident, or by superior force \*.

The feller  
owes war-  
ranty to  
the buyer.

\* Truly, what happens by superior force happens by accident; wherefore, since when the contract of buying and selling is perfected (§ 353); the owner must stand all chances, even when a thing sold is carried off from the buyer by chance or superior force, he cannot seek warranty or reparation from any person. Moreover, there is no doubt, but, as other pacts added to this contract ought to be valid; so the buyer and feller may agree that there be no warranty, but that the thing may be entirely at the buyer's risk. Such a pact was added to the selling of the girl by Sagaristio in Plautus, in *Perfa*, 4. 4. v. 40.

*Prius dico : hanc Mancupio nemo tibi dabit, jam scis ?*  
*Do. Scio.*

Sect. CCCLVII.

Moreover, because buying and selling is a contract, (§ 350); but a contract requires the consent of both parties (§ 327), it is manifest, that in buying and selling all turns upon agreement; and therefore any other pacts may be added to it by consent, provided they be not absurd, unjust, or fraudulent; as for instance, *addictio in diem*,—*lex commissoria*,—*pactum de retrovendendo*,—*pactum promissos*,—*pactum de evictione non præstanda*,—*pactum*

Other  
pacts may  
be added  
to this  
contract.

*de pœna in casum pœnitentiæ præstanda*, and such others \*.

\* The definitions of these pacts are known from the civil law. *Addictio in diem*, is a pact which gives the seller leave to accept of any better bargain that shall offer itself by such a day, which may be done two ways. First, when the bargain is compleated, but upon condition that it shall be null, if better terms offer themselves: Or, secondly, if it be only agreed, *de futuro*, that it shall be a bargain, if better offers are not made. *Lex commissoria*, makes void the bargain, if the price be not paid by such a day. We have an example of it in Cornelius Nepos in the life of Atticus, c. 8. *Pactum de retrovendendo*, is an agreement, that upon tender of the price at any time, or by such a certain day, the buyer shall be obliged to restore the goods to the seller or his heirs. Such is that sale in Livy, 31. 13. and that in Julius Capitolin. in Marco c. 17. *Pactum protomiseos*, is the privilege of the first refusal, that is, if the buyer be hereafter disposed to part with the commodity, he must let the seller, or his heirs, have the first refusal, at the same rate he would sell it to another. The nature of the rest is obvious from the terms by which they are expressed. [*Eviotion* is the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, because of the right which a third person has to it; so that *pactum de eviotione non præstanda*, is an agreement between the seller and the buyer, that the former shall not be obliged to warrant the buyer against all danger of being evicted or troubled in his possession of the thing sold. Warranty being a consequence of the contract of sale, there is a first kind of natural warranty, which is called *warranty in law*, because the seller is obliged to it by law, altho' the sale make no mention of it. And it being in our power to augment or diminish our natural engagements by covenants, there is a second kind of warranty, which is a warranty by deed or covenant, such as the seller and buyer are pleased to regulate among themselves. *Pactum de pœna in casum pœnitentiæ præstanda*, is an agreement to pay a fine, in case of repenting and not standing to the bargain.]

As like-  
wise ex-  
ceptions  
and con-  
ditions,

#### Sect. CCLVIII.

From the same principle we infer that a seller may *except* something for himself in the sale, and that

that either party may add to the bargain any *condition* not repugnant to honesty and good manners, as likewise appoint a day, before which the thing is to be delivered, and the price paid \*. Nay, that they may also agree, that the price not being paid, the property shall remain for some time with the seller, or that the buyer, retaining some part of the price in his hands, for which he is to pay interest, may be thus secured against eviction; that accessions shall go with the principal, that some fixed things may be carried off, that the thing sold shall be let at a certain rate to the seller, &c.

\* Nay the sale may be so agreed upon, as that a certain term of years agreed upon being run out, the thing sold shall then return to the seller or his heirs, and yet the buyer shall not redemand the price paid. Estates are often sold in this manner. See Pufendorff, law of nature, &c. 5. 5. 4.

## Sect. CCCLIX.

Buying by  
cant or  
auction.

Besides, we conclude from the same principle, that tho' buying and selling requires equality, (§ 352); yet, by the consent of both parties, a sale may be agreed upon which shall not be null on the account of any inequality whatsoever. Such are *auction*, when the price is not fixed by the seller, but by the highest of contending bidders: *emptio sub hasta*, which is nothing else but a more solemn auction, instituted by public authority: *emptio per aversionem*, when things of different value are not rated separately, but sold together: and *emptio spei*, when the purchase is no certain thing, but hope and expectation only, on which, by agreement of the parties, a price is laid. In all which contracts, since equality is not required, by consequence neither of the parties can complain of injury in these cases, unless there be some knavery on either side, or the thing produced by the event was not thought of by the contracters.



\* And hence we may decide the famous suit between the fishers and the Milesian youth, who had bought the cast of a net from them, occasioned by the fortune of the cast, the fishermen having drawn out a golden tripod in their net, each party contended this unexpected treasure was theirs, and the oracle very absurdly adjudged it to the wisest.

*De tripode ex Phæbo quæris, Milesia pubes ?  
Huic tripodem addico, cui sit sapientia prima.*

Laert. 1. 28. Val. Max. 4. 1. But it is plain that the tripod belonged to the fishermen, if its owner was not known (§ 324), notwithstanding the contract, the Milesian youth having only had regard in the contract to what fish should be caught, and not to golden tripods, of which neither of the parties could have any thoughts. See l. 8. § 1. D. de contr. empt. l. 11. § ult. & l. 12. D. de act. empt.

#### Sect. CCCLX.

Of letting  
and hir-  
ing.

The other contract which took place after the invention of money, is *letting* and *hiring* (§ 350): For tho', according to the Roman law, in letting farms a part of the fruits was paid for the rent, which was called *quanta* \*, l. 21. 6. loc. conduct. and thus this contract could take place before money was in use; yet there is no reason why it may not be referred to the contract, "*I give that you may give*;" because in this case the use of the thing is not compared with money or eminent price, but with the proper or vulgar price of the fruits; and therefore the value of fruits not being always the same, but higher or lower according to the plenty or scarcity of the season, one year the proprietor might be a loser, and another year the tenant.

\* For if the lord of the manor stipulate to himself a certain portion for his rent, that bargain hath the nature of partnership, as will appear from the definition of these contracts, when we come to treat of them. Moreover, letting a fruitful farm for a certain share of the fruits, is not a contract of renting and hiring, as is plain from this consideration,

consideration, that the latter is an onerous contract, in which equality is required (§ 324); but in the former it cannot obtain. For if one should stipulate to pay for the use of a farm for six years, every year so many measures of grain, it may happen that in one year of great plenty, when corn is very abundant and cheap, the rent shall be moderate, and proportioned to the use of the farm, but another year of scarcity it shall be immoderate on the account of scarcity and dearth. And therefore, we have already said, that renting and hiring requires that the price be paid in money (§ 350).

## Sect. CCCLXI.

Because *renting* and *hiring* is a contract for the use of a thing, or labour at a certain rate or hire; the consequence is, that he who lets ought to grant the use of a thing, or the labour contracted for, to the person who hires it; and therefore, if, by his fault, or by accident, it happens that he who hires cannot have the use of the thing hired, or cannot perform the labour promised, the stipulated hire justly diminishes in proportion\*. Yea, sometimes the lessor may be sued to the value; and the same holds, if the landlord should expel, without a just cause, the tenant before his lease is out.

The duties of the landlord.

\* This equity was acknowledged by all the ancients, as by Sesostris king of Egypt, who, if any part of the land was washed away by the force of the river, ordered the rent to be proportionably diminished, Herodot. l. 2. p. 81. edit. Steph. Nor did the Romans observe less equity in this affair, according to Polybius, hist. 6. 15. and among them Cæsar, by Sueton's relation, cap. 20. But it is manifest, that here likewise ought to be understood a considerable loss, and not a very small one, seeing the barrenness of one year is often compensated, especially in farms, by the plenty of a succeeding year; and it is unreasonable that the tenant should have all the advantages, and yet refuse to bear the smallest share of loss.

## Sect. CCCLXII.

And of  
the te-  
nant.

In like manner it is the tenant's duty to pay in due time the stipulated rent, to use what he hath the use of as another's, to be returned in specie, like an honest man, to make up damages owing to his fault; and not to desert the farm while his lease is yet unexpired, unless he be forced to it by just causes, as the incursion of an enemy, the fear of a plague, and other such dangers. For since the landlord is obliged to deliver him the thing safe and sound, to indemnify him, and not to turn him out before his time is expired (§ 361); it is most equal, that what he would not have another do to him, he should not do to another; and, *vice versa*, what he would have another do to him, that he should do to another (§ 88); especially since in this chargeable contract equality ought in justice to be observed (§ 329).

## Sect. CCCLXIII.

Of pacts  
which  
may be  
added to  
this con-  
tract.

But this contract also depends wholly upon consent (§ 327); and therefore it is plain that several pacts may be annexed to it, provided they be consistent with good morals\*; and therefore that it may be with, or without conditions, and for a certain time. And since tacite consent is held for real consent; hence we may infer, that *tacite re-hiring* is valid, if the first lease being elapsed, neither party renounces the contract; and that in this case it is just that the same terms should take place as in the former engagement.

\* Hence it is, that estates are often let out on such conditions that in renting and hiring very little remains of the nature of such a contract. Hence perpetual leases, hence irregular ones, by which at once the dominion, and all hazards, are devolved upon the lessee; of which we have an instance quoted from Alfenus Varus by Corn. van Bynkershoek, observ. 8. 1. & seq. ad legem 31. D. locati. There is such a contract among the Germans, of which I have

have treated Element. juris Germ. 2. 14. § 105, after Tabor, who has given us a dissertation on this subject.

Sect. CCCLXIV.

Now those are the contracts which began to take place after money was in use; we are therefore, in the next place, to consider those contracts which could have place either before or after money was found out. The chief of which is the contract of loan, *mutuum*; by which we understand granting the use of consumable things, on condition that as much shall be restored in kind \*. For since not only money, but every consumable commodity may be credited in this manner, it is plain that this contract had place before men had acknowledged money for a common measure of things, and it is now most frequent.

\* We call those consumeable things which we can number, measure or weigh. And this is the nature of them, 1. That they cannot be used without being abused or consumed. 2. That they may be returned either in kind or in species, l. 2. § 1. D. de rebus cred. i. e. if I owe a hundred guineas, my creditor will own himself satisfied whether I return him the same guineas I received from him, or others of the same kind. And hence it is plain what is meant by the same kind: it means the same in quantity and quality. But thence follows another property of consumeable commodities. 3. viz. That with respect to them as much is the same, Nor, 4. do they (as Thomafius has observed de pretio adfect. in res fung. non cad.) admit of a price of fancy, unless they be very scarce, so that as much in kind cannot easily be found. Thus, tho' at Rome Falernian wine was a consumeable commodity, yet a price of fancy fell upon Trimalchion's Opimian wine of a hundred years old, Petronius Arbit. Satyric. cap. 34.

Sect. CCLXV.

It is plain, from the definition of this contract, (§ 364), that the debtor has the power of abusing the thing credited to him; and therefore the creditor

The dominion of the thing credited is transferred to the debtor.



tor has abdicated his right of excluding the debtor from the use of it; and thus he hath, only upon condition of receiving as much from the debtor, transferred to him all his right; but to transfer the right of excluding others from the use of a thing, is to transfer dominion (§ 231); wherefore this contract is an alienation, by which the dominion of the things credited passes intirely to the debtor.

\* It is well known what a bustle Alexius a Massalia, *i. e.* Claudius Salmasius, has made about this affair, endeavouring to turn the defenders of this Thesis into ridicule. But all his weapons borrowed from the civil law, and much stronger ones, have been turned against him by Wiffenbachius, Fabrottus, and other learned men, inso-much that the subject is now exhausted. But the principles here laid down shew, that right reason is not against the Civilians in this matter, and does not favour Salmasius. It is true that the creditor does not alienate the quantity, but preserves it safe to himself, by obliging the debtor to return him the same in kind: But the dominion of the species credited, and all the risks, pass undoubtedly to the debtor, as Salmasius himself, being pushed to the utmost extremity, is forced by his adversaries to own.

#### SECT. CCCLXVI.

The  
debtor's  
obliga-  
tion.

From the same definition we infer, that the debtor is obliged to return as much, not only in quantity, but in quality; and therefore, if it be money that is lent to him, and its intrinsic value should afterwards be augmented or diminished, regard is to be had to the time when the contract was made; and accordingly so much ought to be diminished as the money has rose, or so much ought to be added as the money has fallen. Moreover, the debtor ought not to delay paying; nor is he delivered from his obligation by the perishing of the consumeable commodity he received from his creditor, nor by any accidental event\*.

\* For

\* For since the dominion of a consumeable commodity is transferred to the debtor (§ 365), but he who has the dominion must stand chances (§ 211), the creditor cannot be freed from his obligation, if, *e. g.* the wine lent him should turn into vinegar, or the money lent should be stolen from him, or be lost by any other accident. Much less then will poverty excuse a debtor from payment, if he has squandered away his estate, or, like an idle drone, lives at another's expence, and wantonly consumes on his pleasures the gains of another's sweat and labour. For this is a most pestiferous race, ready to engage in the vilest schemes. And they who have wasted their own substance must needs covet that of others. See Salust. Catil. cap. 20.

## Sect. CCCLXVII.

But tho' this contract be in its nature gratuitous, (as well as commodatum, of which above, *i. e.* loan of not consumeable things); yet the love of mankind waxing cold, it hath become customary for creditors to stipulate a reward to themselves for what they lend to their debtors; which, if it consist in paying monthly or yearly a certain proportion of the sum lent, as 3, 4, or 5 per cent. it is called *interest* or *usury*, tho' that last term is often taken in a bad sense for exorbitant interest, by which creditors reduce their debtors to the last dregs. Concerning usury, it is a celebrated question, that has been severely agitated by learned men, whether it be agreeable to the law of nature for creditors to stipulate with debtors for it.

Whether  
usury be  
allowable  
by the law  
of nature?

\* We need not insist long upon the history of this controversy, which was revived in Holland the last century. We are saved this labour by Noodt de *foenore & ufuris*, 1. 4. Martinus Schook *exercit. var.* p. 430. and Thomas. not. ad Lancellot. 4. 7. not. 275. p. 2024. the last of whom hath given us a full history of the rise of this dispute, and of the managers on both sides of the question. It must however be acknowledged, that most of the learned who have wrote upon this subject have been more taken up about the divine positive law than the law of nature;

fo

so that very little advantage is to be reaped from them by students of natural law.

Sect. CCCLXVIII.

What is  
to be af-  
firmed  
here.

But since, 1. It is not unjust to communicate our goods with others, not gratuitously, but for a hire (§ 328). 2. Since one often makes great gain by the use of another's goods, while, in the mean time, the creditor suffers loss or inconvenience by the want of them; but none ought to enrich himself at the detriment of another (§ 257). 3. Besides, since he runs a great risk who lends his goods to another on these terms, that he may consume or abuse them, it is not unreasonable that the creditor should exact a hire from the debtor in proportion to the risk (§ 331).—From all these considerations, we think it may be justly concluded, that a pact about interest with one who may make gain of our money, is not contrary to the law of nature \*. And tho' interest ought to be proportioned to the gain which the debtor may, in all probability, make of the sum; yet it is not iniquous that it should be augmented in proportion to the risk, the scarcity of money, and other circumstances (§ 331), as the custom of *bottomry* shews us, dig. l. 22. tit. 2. de nautico fœnore.

\* To this doctrine it is in vain objected, as, 1. "That money is a barren thing, and therefore that usury, as a kind of offspring, ought not to be required for it." For it is a barren thing in a physical sense, but not in a civil sense; for in commerce the double, and very often more, is gained by it, Mat. xxv. 16. 17. Or, 2. "That loan of inconsumeable things is gratuitous, and therefore loan of consumeable goods ought to be so too." For he who lends an unconsumeable thing suffers less inconvenience, and runs less risk than a creditor who transfers to his debtor the dominion of a consumeable thing, with the power and right of abusing it. Or, 3. That God hath prohibited such pacts, Exod. xxii. 25. Lev. xxv. 37. Psalm xv. 5. Luke vi. 34." For God proscribed such pacts

pacts from the Israelitish common-wealth, so far only that an Israelite could not exact interest from an Israelite; they were permitted with strangers, Deut. xxiii. 19. 20. But the law of nature makes no difference between fellow citizens and strangers. See Jo. Selden de jure nat. & gent. See Heb. and Jo. Cleric. ad Exod. xxii. 25. p. 112.

Sect. CCCLXIX.

Another contract of this kind is *pawn* or *pledge*, by which we understand an obligation to deliver something to a creditor for the security of what he lends or credits. For if a thing, especially if it be in its nature immoveable, be not delivered, but yet the creditor hath a right constituted to him in it, of taking possession of it, in case the debt be not cancelled, that transaction between the creditor and debtor is called *hypotheca*, *mortgage*. Again, if it be agreed that a creditor should receive the fruits of a thing delivered to him for the security of what he hath credited, in lieu of interest, this invention is termed *pactum anticbreticum* (§ 283.)

What is meant by pledge, mortgage, and in anticbretic pact.

Sect. CCCLXX.

From the definition of a *pawn*, it is plain that it ought to be the debtor's own; and therefore he deserves punishment who pawns any thing belonging to another, whether lent to him, deposited with him, or hired by him. That the creditor ought not to use a pawn, if it may be rendered worse by use, but to preserve it with as much care as his own goods, and to return it to the debtor, when the debt is cleared. Finally, since the owner regularly runs risks \* (§ 211), the consequence is, that the risk of the pawn belongs to the debtor, and that perishing by accident, he is notwithstanding obliged to pay his debt.

What is just about a pawn.

\* By the law of Germany in the middle ages, when a pawn perished by chance, the debtor was freed from all obligation to pay his debt, jus prov. Sax. 3. 5. Sometimes it



it was provided by a special pact, that the risk should belong to the creditor, as in Pontan. hift. Dan. l. 9. ad annum 1411. But because that proceeded from this singular principle of the Germans, that the creditor got the dominion of the pawn, of which see our Elem. jur. Germ. l. 2. 11. §. 319. the reasons given in this section do not permit us to attribute these things to the law of nature.

## Sect. CCCLXXI.

What is just about mortgage. From the definition of *mortgage* (§ 369), we infer, that it can scarcely consist in moveables, which a debtor may easily alienate and transfer to a stranger without his creditor's knowledge; but it consists chiefly in immoveables, as houses, lands, cities and territories\*; and likewise in larger stocks of moveable things, which are not easily transported from place to place, as large libraries; yea, in rights and actions likewise, if great advantage accrue from them to the possessor. But whatever is thus pledged to a creditor, his right in it continues, to whomever it may be transferred; for otherwise his *hypotheca* would be without effect.

\* This we add on account of what Pufendorff says of the law of nature, &c. 5. 10. 16. "In the state of nature such mortgages are needless; for if the debtor refuses payment, the possession of the mortgage assigned in security, must be detained by force of arms. But in that state, even without such a particular assignment, it is lawful to seize on any thing that belongs to the debtor." But examples of such mortgages are not wanting even among independent nations, as Hertius has shewn in his notes upon this passage of Pufendorff, p. 738. & seq. who elegantly replies to Pufendorff's argument, that this mortgage may be of great use, if the town thus pledged should fall into a third person's hands. Moreover, we readily grant, that independent nations do not rashly satisfy themselves with such simple mortgages, but do at least stipulate the right of keeping a garison in these cautionary towns, as Elizabeth queen of England did in the 1585, when the Hollanders put several towns into her hands, Em. Meteran. Rer. Belg. l. 13. and the other Belgic annalists for that year.

Sect.

Sect. CCCLXXII.

From the definition of the *pactum anticbreticum*, What is  
 (§ 369), it is obvious that it can only take place in just about  
 pawning things which yield increafe; and since the the pac-  
 fruits are in lieu of interest, they ought not great- tum anti-  
 ly to exceed that measure of interest which we have chreticum.  
 found to be most agreeable to equity. The credi-  
 tor, in this case, is not liable to accidents, unless it  
 be so agreed; and therefore if the creditor, on ac-  
 count of barrenness, or any public calamity, does  
 not receive the value of the interest due to him,  
 the debtor is obliged to make it up.

Sect. CCCLXXIII.

This is in common to all these contracts, that What is  
 being designed for the security of the creditor, common  
 (§ 369), the creditor, if the debtor be tardy in his to all these  
 payment, has a right to alienate the pawn or mort- conven-  
 gage, and deducting his principal and interests, is tions.  
 obliged only to refund the overplus to the debtor,  
 unless there be an accessory pact, *lex commissoria*;  
 by which it is stipulated, that the pawn, if not re-  
 lieved within a certain time, shall be left to the  
 creditor for his principal and interests. For tho'  
 the more recent Roman laws did not allow of such  
 a pact\*, l. un. C. Theodos. de commissor. rescind.  
 l. ult. C. de pact. pign. and that might have been  
 justly done on account of the exorbitant avarice of  
 creditors; yet it does not follow from hence, that  
 the law of nature, which permits every owner to  
 alienate his own on whatsoever conditions, does not  
 allow of such a pact (§ 309), which Hertius hath  
 shewn, by many examples, to have been in use a-  
 mongst princes and independent nations, in his  
 notes upon Pufendorff, 5. 10. 14. p. 737.

\* The more ancient laws among the Romans adhering  
 more strictly to the simplicity of the law of nature, are  
 not contrary to this commissory pact; yea, while the re-  
 public

public was yet free, it was looked upon as lawful, as appears from a passage in Cicero's epistles, epist. ad famil. 13. 56. quoted by Hertius, and before him by Jac. Gothofred. ad l. un. Theodos. de commiss. rescind. (Philotes Alabandenses *ὑποθήκας* Cluvio dedit : hæ commissæ sunt). But the terrible severity of creditors, by which debtors were unmercifully squeezed, being forced to pawn, in this manner, things of much greater value than the debt, at last obliged the emperors to proscribe this pact, as exceeding detrimental to debtors.

## Sect. CCCLXXIV.

Of suretyship.

The third contract which may take place before and after money is invented, is *suretyship*; *i. e.* an obligation a person comes under to pay another's debt, if he does not. For if one binds himself not merely to pay, the other failing, but conjointly with him *in solidum* for the whole debt, he is debtor, and the obligation of both is equal. Again, he who, with the consent of the creditor, delivers a debtor from his obligation, and takes it upon himself, is called *expromissor*, *Bail*. All these contracts, as well as that of pawn or mortgage, are contrived for the security of creditors, and afford an ample proof of the decay of benevolence among mankind \*.

\* For if benevolence prevailed, as it ought to do, among mankind, a creditor would not distrust a debtor, nor would a debtor allow one thought of defrauding his creditor to enter into his mind; and thus there would be no occasion for pawns or sureties. But now that men are become so suspicious and diffident, that they will not believe unless they see, this is an argument of the decline of benevolence, and of the prevalence of perfidy among men. This is allowed by Seneca in a most beautiful passage (of benefits, 3. 15).

## Sect. CCCLXXV.

Moreover, from the definition of *suretyship*, (For what things it is (§ 374), it is plain that there is no place for suretyship, which is a subsidiary security, unless the debt

debt be such that it may be as conveniently paid by another as by the principal debtor ; and therefore suretiship for condemned persons, tho' some ancient nations admitted it, is contrary to right reason \*. But yet there is no reason, when the crime may be expiated by a mulct, why another person may not interpose in behalf of the criminal, and oblige himself to pay the mulct, if the criminal fail.

\* Pufendorff, 5. 10. 12. hath brought many instances of it among the Greeks ; and Hertius in his notes on Pufendorff, ibidem, p. 735, produces statutes approving of such sureties. But as for others who pretend to justify this kind of suretiship by examples in the sacred writings, they are easily refuted, Gen. xlii. 37. For every one may perceive that obligation of Reuben to have been foolish, especially seeing he did not pledge his own head, but the lives of his innocent children ; and besides, it was not for a condemned person, but for his brother Benjamin's return out of Egypt. Whence it is not probable that the pious and prudent Jacob accepted of the offered security, Gen. xliii. 9. Juda offers security, but not for a condemned criminal, nor does he pledge his life. Finally, 1 Kings, xx. 39. there no person pawns his life for a guilty criminal, but the custody of a captive is demanded under the peril of death. So that there is nothing in the sacred writings to justify this custom among the ancients.

#### Sect. CCCLXXVI.

As to the obligation of sureties, it is plain, <sup>The obligation of</sup> from the definition (§ 374), that they oblige themselves to the same which the creditor has a <sup>sureties.</sup> right to exact from his debtor, and therefore it is unjust for a creditor to stipulate more to himself from a surety than from the debtor ; that the obligation of a surety is subsidiary, and therefore that by the law of nature a surety does not stand in need of the *singulari beneficio ordinis vel excussionis*, as it is called in the civil law ; but may then be sued, when it clearly appears that the principal debtor has not

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where-



wherewith to pay \*. Many sureties engaged for the same persons and debts, are only bound proportionably, unless they have voluntarily and expressly bound themselves for the whole; and therefore the benefit of division is due to them by the law of nature, as being proportionably bound, unless one's fellow-sureties be insolvent, and one could not but know they were so.

\* A contrary opinion hath prevailed in many nations, who thought that recourse might be had to the surety before the principal debtor. Concerning the Hebrews, see Prov. xx. 16. xvii. 18. As for the Greeks, that saying of Thales is well known, "Be surety, and ruin is at your heels." The ancient Germans had likewise such a proverb. See Schilt. Exercit. 48. 21. The same rigour was also observed by the Romans, till Justinian introduced the *beneficium ordinis vel excussionis*, novella 4. But since a surety only accedes as a subsidiary security on failure of the principal, if he might be immediately sued, there would be no difference between the Surety, the Expromissor or Bail, and the Principal debtor. It is therefore agreeable to right reason, that he who is bound as a subsidiary security, should not be sued before the discussion of the principal debtor. So Cicero Epist. ad Attic. 16. 15. "Sponsores adpellare, videtur habere quamdam *δυσωνίαν*."

#### Sect. CCCLXXVII.

Of the solidity among two or more debtors. When two or more become debtors of one and the same *thing* (§ 374), it is evident, that every one of them being obliged to the creditor for the whole debt, the creditor may exact the whole debt from either of the two he pleases \*; and when any one of them pays the debt, the other is discharged from his obligation to the creditor, but not with respect to his fellow-surety; for he who paid for him (§ 346) did his business, and therefore ought to be indemnified by him (§ 349).

There is therefore no place here for the division of an obligation. But because if both who are bound in solidity be solvent, and both may easily be sued, there is no just cause

cause why the creditor should press one, and extort the whole sum from him alone ; humanity does not allow one so rigorously to prosecute his right, as to press any one singly, but commands us to have recourse to both. For surely humanity doth not permit us to demand any thing from any other which we can obtain otherwise, without detriment to ourselves or any other (§ 216).

Sect. CCCLXXVIII.

Again, from the definition of an *expromissor* or *As to an bail* (374), we infer, that his obligation is the same <sup>expromis-</sup> with that of the principal debtor, inasmuch that <sup>for or</sup> the latter, bail being accepted by the creditor, is free; and therefore neither can this kind of surety plead the discussion of the principal debtor before him; nor can the creditor, if he cannot recover his debt from this surety, any more have recourse to the principal debtor whom he hath once freed, but he must depend upon this surety alone for it, upon whose faith he had relieved his debtor.

Sect. CCCLXXIX.

The next contract which may take place either <sup>The con-</sup> where money is, or is not in use, is *partnership*, <sup>abstract of</sup> it may plainly do, since it is nothing else but shar- <sup>partner-</sup> ing among many the profit or loss that may arise <sup>ship.</sup> from joint stock or labour \* : for commodities and labour may be communicated either before or after money is in use.

\* We are therefore here treating of community in consequence of the consent of partners. But because consent may be either tacit or express, and both have the same effect (§ 275), the consequence is, that partnership may be contracted by tacite consent, *i. e.* by deed, Hert. diss. de societate facto contr. Now, since either all goods and labour, or a certain share only, or some particular goods and labour, may be joined, partnership may be either universal, or general, or particular. Grotius of the rights of war and peace, 2. 12. 24. hath justly remarked, that universal and general partnership have something of chance in them ; but that

in particular or singular partnership, equality ought to be observed.

## Sect. CCCLXXX.

What is  
just with  
respect to  
partner-  
ship.

Because in *universal* partnership all things, in *general* partnership some things only are common; so that these contracts somewhat depend upon chance (§ 379); the consequence is, that amongst such partners the loss and gain must be common, but the contribution may be very unequal; and therefore such a partner hath no reason to complain if his fellow-partner expends more than him, when his necessities require it; yea, a partner is obliged to pay his proportion of debt contracted by his fellow-partner; for which reason, it cannot be doubted that it is highly reasonable that every one of such partners should share of the gain made by any one of them; and that he who has a right to the gains, ought to bear his share of the loss, damages, or inconveniencies.

## Sect. CCCLXXXI.

What in  
singular  
partner-  
ship.

But since in *singular* or particular partnership equality ought to be observed (§ 380), which however is not always observed in the contribution; it follows, that the equality in dividing loss and profit cannot be *arithmetical*, but must be *geometrical*\*. And therefore he who hath contributed more stock or labour, ought to have a proportionably greater share of profit and loss than he who contributes less. But seeing any one can grant to any other whatever advantages he pleases with regard to his own goods (§ 309), it is undeniable that partners may agree one with another in any manner; and may observe, in dividing loss and gain, either arithmetical equality, or any inequality, unless, by the knavery of one or other of them, the division degenerates into that of the lion in the fable, Phæd. Fab. 1. 6.

\* Some

\* Some have said, that arithmetical equality ought to be observed here, as among brethren; and thus they interpret, l. 6. l. 29. l. 80. D. pro Soc. and other Roman laws, Connan. Comment. jur. civ. 7. 19. 5. Huber. Prælect. ad tit. Inst. de societate. But this fraternity of partners is a fiction, to which the law of nature is a stranger; and besides, in this case the profit arises from joint stock and labour; wherefore, nothing can be more just than that loss and gain should be shared proportionably to stock and labour. So Aristotle rightly decides the matter, ad Nicom. 8. 16.

## Sect. CCCLXXXII.

In fine, since partnership is formed by consent, <sup>Whether</sup> and by way of convention (§ 379), this rule of the <sup>one part-</sup> Roman law can hardly be deduced from the prin- <sup>ner may</sup> ciples of the law of nature, *viz.* "That any one <sup>quit the</sup> may quit partnership, provided he do it not frau- <sup>partner-</sup> dulently, nor at an improper time\*." The whole <sup>ship a-</sup> matter rather turns upon the conditions of the a- <sup>gainst the</sup> greement; and therefore, if the partnership was <sup>other's</sup> contracted for perpetuity, it ought to be perpetual; <sup>will?</sup> if for a time only, it is but for the time fixed; unless one of the partners be injurious to the others, and do not fulfil the articles of agreement; in which case, it is most just that the others should have the right of renouncing the partnership even before the time agreed upon in the contract.

\* This may be proved from the very reasons brought by ancient lawyers. For sometimes they give this reason, "That community is the mother of discords, l. 77. § 20. D. de legat. Sometimes they say, "It is a natural vice to neglect what is in common, l. 2. C. quando & quibus quarta pars. To which some add another reason, "That respect is had in the choice of a partner to his abilities and industry; and therefore, if either partner does not answer his co-partner's hope and expectation, with regard to his honesty and diligence, the other hath a right to renounce the partnership." But buying and selling, renting and hiring often produce as much discord, in which contracts they allow no place for changing one's mind, or repenting.



And houses let, are often no less neglected than houses in common to many, and yet it is not allowable to break such a contract before the time is out. Again, he who hires one to work for him, hath regard to the skill, honesty and industry of the person he hires, and yet he cannot break his contract before the time is expired. If therefore this rule takes place in other contracts, why may it not be allowed to take place likewise in partnership, l. 5. C. de obl. & art. "As every one is at liberty to contract or not contract, so none can renounce the obligation he hath once come under, without the consent of his party."

## Sect. CCCLXXXIII.

Of donation.

Let us add *donation*, by which we understand a promise to transfer something of ours to another gratuitously. From which definition, it is plain that it may be made with or without conditions; and therefore in view of death. So that *donations* are justly divided into *donations among the living*, and *donations in prospect of death*. And a donation among the living obliges to deliver the thing promised, and leaves no room to the donor to revoke his promise. But from what was said above, it is evident, that he who receives the donation cannot demand warranty from the donor, if the thing be evicted (§ 274), and that he is obliged to shew gratitude to his benefactor by words and deeds on all occasions (§ 222).

## Sect. CCCLXXXIV.

Some corollaries about contracts in general.

To conclude; with regard to all contracts in general, it is to be observed, that because they consist in consent (§ 327), they can only be formed by those who are not incapable, by nature or by law, of consenting. Again, because they were devised for the sake of commerce (§ 327), they must be about things which may be in commerce honestly, and with the permission of the laws; and therefore contracts about impossible or base things, or things esteemed by the laws from commerce, are null: but

but as many things are exeemed by positive laws from commerce, which naturally are subjects of it, so positive laws may likewise permit contracts about several things which are not subjects of commerce, according to the laws and manners of other nations \*.

\* For example, with us it is base and to no purpose to pawn dead bodies. But the laws of the Egyptians permitted pawning of dead bodies, and denied burial to children if they neglected to relieve such pledges by paying their parents debts, Diod. Sicul. Bibl. 1. 93. On the other hand, it is unnatural and abominable to pawn wives and children, as was permitted in the kingdom of Pegu, because it must be attended with most miserable consequences. And therefore the Romans judged him worthy of banishment, who knowingly accepted in pawn a free-born child from his father, l. 5. D. quæ res pign.

#### REMARKS on this chapter.

It seems necessary to add a little to what our Author hath said in this chapter concerning usury, to shew at one and the same time, the true state of the case with regard to the forbidding of usury in the Israelitish commonwealth, and how civil laws may confine and alter natural rights, consistently with the law of nature. And here all we have to do is to copy a little from our excellent politician Mr. Harrington, in his prerogative of popular government (p. 245.)

Mr. Harrington, who hath shewn at great length, that property must have a being before empire or government, or beginning with it must still be first in order, because the cause must necessarily precede the effect, reasons thus: "Property comes to have a being before empire two ways, either by a natural or violent revolution: natural revolution happens from within, or by commerce, as when a government erected upon one balance, that for example, of a nobility or a clergy, through the decay of their estates, comes to alter to another balance; which alteration in the root of property, leaves all to confusion, or produces a new branch or government, according to the kind or nature of the root. Violent revolution happens from without, or by arms, as when upon a conquest there follows confiscation. Confiscation again is of three kinds, when the captain taking all to himself, plants his army by way of military colonies, benefices or Timars, which was the policy of Mahomet; or when the captain has some sharers, or a nobility that divides with him, which was the policy introduced by the Goths and Vandals; or when

the captain divides the inheritance, by lots or otherwise, to the whole people; which policy was instituted by God or Moses in the commonwealth of Israel. Now this triple distribution, whether from natural or violent revolution, returns, as to the generation of empire, to the same thing, that is, to the nature of the balance already stated." Mr. Harrington having fully proved these points, or that property is the natural cause of government, and that changes in it must make proportional changes in government, it follows from hence, that unless the balance of property be fixed, empire or government cannot be fixed, but will be continually altering as the balance of property varies; but property in land can only be fixed by an Agrarian law. Now these principles being laid down, the following truths concerning money, and the methods of regulating it in governments will be manifest, namely, "That the balance in money, as Mr. Harrington expresses it, may be as good or better than that of land in three cases: First, where there is no property of land yet introduced, as in Greece during the time of her ancient imbecility; whence, as is noted by Thucydides, *The meaner sort, through a desire of gain, underwent the servitude of the mighty.* Secondly, in cities of small territory and great traffic, as Holland and Genoa, the land not being able to feed the people, who must live upon trade, is over-balanced by the means of that traffic, which is money. Thirdly, in a narrow country, where the lots are at a low scantling, as among the Israelites; if care be not had of money in the regulation of the same, it will eat out the balance of land. For which cause, tho' an Israelite might both have money, and put it to usury, (Thou shalt lend [upon usury] to many nations, Deut. xv. 6. and xxiii. 19.) yet might he not lend upon usury to a citizen or brother. Whence two things are manifest. First, that usury in itself is not unlawful: And next, that usury in Israel was no otherwise forbidden, than as it might come to overthrow the balance or foundation of the government. For where a lot, as to the general, amounted not perhaps to four acres, a man that should have a thousand pounds in his purse, would not have regarded such a lot in comparison of his money; and he that should have been half so much in debt, would have been quite eaten out. Usury is of such a nature, as, not forbidden in the like cases, must devour the government. The Roman people, while their territory was no bigger, and their lots, which exceeded not two acres a man, were yet scantier, were dead alive with it; and if they had not helped themselves by their tumults, and the institution of their tribunes, it had totally ruined both them and their government. In a commonwealth whose territory is very small, the balance of the government being laid upon the land, as in Lacedemon, it will not be sufficient to forbid usury; but money itself must be forbidden. Whence Lycurgus allowed of none, or of such only as being of old or useless iron, was little better, or if you will, little worse than none. The prudence of

which

which law appeared in the neglect of it, as when Lyfander, General for the Lacedemonians in the Peloponnesian war, having taken Athens, and brought home the spoil of it, occasioned the ruin of that commonwealth in her victory. The land of Canaan, compared with Spain or England, was at most but a Yorkshire, and Laconia was less than Canaan. Now, if we imagine Yorkshire divided, as was Canaan, into six hundred thousand lots, or as was Laconia into thirty thousand, a Yorkshireman having one thousand pounds in his purse, would I believe, have a better estate in money than in land: Wherefore, in this case, to make the land hold the balance, there is no way but either that of Israel, by forbidding usury, or that of Lacedemon, by forbidding money. Where a small sum may come to over-balance a man's estate in land; there, I say, usury or money, for the preservation of the balance in land, must of necessity be forbidden, or the government will rather rest upon the balance of money, than upon that of land, as in Holland and Genoa. But in a territory of such extent as Spain or England, the land being not to be overbalanced by money, there needs no forbidding of money or usury. In Lacedemon merchandize was forbidden; in Israel and Rome it was not exercised; wherefore, to these usury must have been the more destructive; but in countries where merchandize is exercised, it is so far from being destructive, that it is necessary; else that which might be of profit to the commonwealth, would rust unprofitably in private purses, there being no man that will venture his money but through hope of some gain; which, if it be so regulated, that the borrower may gain more by it than the lender, as at four in the hundred, or thereabouts, usury becomes a mighty profit to the public, and a charity to private men: In which sense, we may not be persuaded by them, that do not observe these different causes, that it is against scripture. Had usury to a brother been permitted in Israel, that government had been overthrown: But that such a territory as England or Spain cannot be over-balanced by money, whether it be a scarce or plentiful commodity, whether it be accumulated by parsimony, as in the purse of Henry VII. or presented by fortune, as in the revenue of the Indies. For in general this is certain, that if the people have clothes and money of their own, these must either rise (for the bulk) out of property in land, or at least, out of the cultivation of the land, or the revenue of industry; which, if it be dependent, they must give such a part of their clothes and money to preserve that dependence, out of which the rest arises, to him or them on whom they depend, as he or they shall think fit; or parting with nothing to this end, must lose all; that is, if they be tenants, they must pay their rent, or turn out. So if they have clothes or money dependently, the balance of land is in the landlord or landlords of the people. But if they have clothes and money independently, then the balance of land must be in the people themselves. in  
which



which case they neither would, if there were any such, nor can, because there be no such, give their money or clothes to such as are wiser, or richer or stronger than themselves. So it is not a man's clothes and money or riches, that oblige him to acknowledge the title of his obedience to him that is wiser or richer, but a man's no clothes, or money, or his poverty. Wherefore, seeing the people cannot be said to have clothes and money of their own, without the balance in land, and having the balance in land, will never give their clothes or money or obedience to a single person, or a nobility, tho' these should be richer in money, in such a territory as England or Spain, money can never come to over-balance land. Henry VII. tho' he missed of the Indies, in which, for my part, I think him happy, was the richest in money of English princes. Nevertheless, this accession of revenue did not at all preponderate on the king's part, nor change the balance. But while making farms of a standard he increased the yeomanry, and cutting off retainers he abased the nobility, began that breach in the balance of land, which proceeding ruined the nobility, and in them that government. The monarchy of Spain, since the silver of Potosi failed up the Guadalquiver, which in English is, since that king had the Indies, stands upon the same balance in the lands of the nobility on which it always stood." See Mr. Harrington himself. What hath been now quoted from him is sufficient to shew in what manner we ought to reason about the regulation of money in a state. There will be occasion afterwards to consider the natural causes of government more fully. But it is plain from what was said in a former remark, 1. That superior wisdom and virtue will naturally create authority. And that, 2. Property alone can give or create power, and will naturally produce it. And therefore, 3. That empire will follow the balance of property : And by consequence, 4. There is no natural mean of fixing government, but by fixing the balance upon which it depends. Wherefore, 5. That is a proper regulation of money with respect to the preservation of a government, which is necessary or proper to fix the balance upon which the nature of that government depends or turns. But, 6. Men have a natural right to form themselves into any form of civil government proper to promote their greater happiness ; and consequently, to make any regulations necessary or proper to that effect. Thus the Lacedemonians had a right, for the preservation of their government, to forbid money, and the Israelites to forbid usury. And thus our government has a right to regulate the interest of money as the nature and end of our government, *i. e.* as the greater good in our government requires. If it be asked what the law of nature says about money in a state of nature, the answer is obvious ; it requires that commerce be carried on with or without money, in an honest candid way ; so as none may be made richer at the detriment of others ; and allows bartering, buying, letting and hiring, and other contracts, all imaginable latitude or liberty within

within the bounds of honesty, the general dictates of which, with regard to all contracts, are sufficiently explained by our Author.

## CHAP. XIV.

### Concerning pacts.

#### Sect. CCCLXXXV.

THO', by the law of nature, there be no difference between *pacts* and *contracts*, both deriving their subsistence and force from consent; yet it may be said, that *contracts*, according to the ancient way of speaking, related to commerce about goods and labour (§ 327); and *pacts* to other things and deeds, which are not matters of ordinary commerce \*. Thus, *e. g.* tho' free persons of either sex are not in commerce, yet among them agreements are made about marriage, to be celebrated either immediately, or some time after; and both these agreements, the former of which is called *betrothing*, the other *full marriage*, come under the title of *pacts*.

The difference between pacts and contracts.

\* Pufendorff, law of nature, &c. 5. 2. 4. has acknowledged this difference. And tho' the Roman writers, because they use the words in another sense, and make another distinction between contracts and pacts, do not always make use of the word *contrahere* in speaking of things in commerce, or the word *pacisci* in speaking of things out of commerce; (for they say *contrahere nuptias*, l. 22. D. de ritu nupt. and *pacisci ab aliquo numos*, Val. Max. 9. 4. 2.) yet the word *contractus* is seldom or never used by them but to signify an agreement about things in commerce. This is so true, that the civilians (contra Donell. comm. juris, 13. 18.) deny marriage to be a *contract*, because it relates to persons and their inseparable union, which are not things in commerce. We may therefore admit this difference between *contracts* and *pacts*.

Sect.

## Sect. CCCLXXXVI.

Why  
pacts are  
necessary.

Now, since men cannot live comfortably and agreeably, except they render one to another those duties of *humanity* and *beneficence* which we have already defined (§ 214); and yet benevolence is become so cold and languid amongst men, that we can hardly depend upon one another's humanity and beneficence for them (§ 326); and besides, these are duties not of perfect, but imperfect obligation, \* (§ 122), and therefore duties which cannot be extorted from the unwilling: for these reasons, there is no other security for our obtaining them but another's obligation to us by his consent; and therefore we ought thus to secure to ourselves the performance of those good offices by others to which we would have a perfect right. Now, this consent of two or more to give, or do any thing which could not be otherwise exacted from them by perfect right, but was due merely in consequence of the law of humanity and beneficence, is called a *pact*.

\* The history of Abraham and Abimelech furnishes us with an example. The law of humanity and beneficence required, commanded both of them, Abraham especially, an upright pious man, who had received many favours from Abimelech, to behave kindly and graciously towards one another: natural reason obliged Abraham to gratitude: And yet we read, Genesis xxi. 23. that they bargained or covenanted friendship the one with the other. And thus the ancients obliged one another by covenants to perform what they were previously obliged to by the law of humanity and beneficence.

## Sect. CCCLXXXVII.

Such pacts  
ought to  
be fulfilled.  
A first  
argument  
to prove  
it.

Nor can it be questioned that such pacts ought to be faithfully fulfilled. For since he who promises any thing, declares his mind, whether by words or other signs; and words are so to be used, that the person we speak to may not be deceived

ceived (§ 196); the consequence is, that all fraud, all lying, all falshood ought to be far removed from those who deliberately make covenants or pacts; and therefore that nothing ought to be held more sacred than keeping faith, or more detestable than perfidy \*.

\* For as by pacts we in some measure supply our indigence; and we make covenants or pacts with others, that they may be obliged to render us those good offices of humanity and beneficence, which we can hardly expect from them without such pacts; it is plain that human life, and all the interests of social commerce, depend upon fidelity in fulfilling them. Therefore Cicero says justly, pro Q. Roscio comædo, c. 6. "To break one's faith is so much the more base and atrocious, that human life depends upon faith." Hence unlying lips have always been reckoned a noble quality, as Euripides expresses it in Iphig. in Taur. v. 1064.

Καλὸν τι γλῶσσο', ὅτω πίστις παρῇ.

*A faithful tongue is a beautiful thing.*

Seçt. CCCLXXXVIII.

There is a second reason which every one will own to be of no less weight. And it is this, the love of justice is the source of all the duties we owe to one another (§ 173), and this love commands us not to do to others what we would not have done by them to ourselves (§ 177). But surely none would desire to be deluded by the promises and pacts of another. It is therefore our duty not to deceive any one by our pacts or promises; not to defraud one, by making him trust to our fidelity; but faithfully and conscientiously to perform what we engage to do \*.

\* We do not here use this argument, "That civil society could not subsist without faith and honesty." For tho' this argument proves the necessity of pacts, and of faithfulness amongst mankind, and Cicero hath elegantly demonstrated this necessity from this consideration, "That without some share of this justice, without faith and pacts among



among themselves, even those who live by villainy and wickedness could not subsist." Yet we have already shewn, that the origine of moral obligation is not to be derived from this principle of sociality (§ 75): And therefore we have rather chosen to give these two reasons in the preceding sections derived from our first principle of *love*.

## Sect. CCCLXXXIX.

Pacts of  
several  
sorts.

Pacts are either *unilateral* or *bilateral*. By the former, one party only is bound to the other; by the latter, both parties mutually oblige or engage themselves one to another; and therefore this latter kind of pacts includes in them a tacite condition, that one is to perform his promise, if the other likewise fulfils the pact on his side. Both however are either *obligatory* or *liberative*. By the former, a new obligation is brought upon one or other, or upon both. By the latter, obligations formerly constituted are taken off. Again, pacts may be of a mixed kind; such are those by which former obligations are annulled, and new ones are constituted at the will of the parties covenanting. Of this kind principally, it is evident, are *novations* and *transactions* about doubtful or uncertain affairs. But there is one rule for them all, which is, that they ought to be faithfully and religiously kept, especially if one hath not promised with an intention to lay himself under a strict obligation \*.

\* This we add, in opposition to those who assert, that there is a perfect and an imperfect promise; the former of which they define to be a promise, wherein the promiser not only designs to be obliged, but actually transfers a right to another, to exact the thing promised from him as a debt: And the latter they define to be a promise wherein the promiser designs indeed to be obliged, but not in such a manner as that the thing promised may be exacted from him by the person to whom he promises it. To which kind they refer this way of promising, "I have purposed to give you such a thing, and I desire you may credit me." As likewise, the promises of great or com-  
plaisant

plaisant men, when they promise one a vote or a recommendation, Grotius of the rights, &c. 2. 2. 2. Pufendorff of the law of nature, &c. 3. 5. 5. But, 1. Such promises are often not pacts, but words or asseverations only, which Grotius and Pufendorff themselves distinguish from pacts: Yea, sometimes, they are but preparations to pacts, or what is called treaties. 2. It is a contradiction to say, one wills to promise, and yet does not will to give a right to exact from him. It is a fiction, by which, if it be admitted, I know not what pacts and promises may not be basely eluded, after the example of the Milanese, who being reproached with perjury, answered, "We swore indeed, but we did not promise to keep our oath." Upon which answer, when Radevicus de gestis Friderici I. l. 2. c. 25. relates it, he justly says, "A suitable answer indeed, that their discourse might be of a piece with their profligate manners; and that they who lived perfidiously and infamously, might speak as wickedly as they lived, and their discourse might be as impure and villainous as their actions." 3. Finally, tho' the promises of great men should sometimes be imperfect with respect to exaction, it does not follow from hence, that they are imperfect in respect of obligation.

Sect. CCCXC.

Hence we infer, that by the law of nature there is no difference between pact and stipulation; and therefore that Franc. Connanus, in his comment. 1. 6. is mistaken, when, to exalt the excellence of the Roman laws, he denies that by the law of nature obligation arises from promises, as long as they are simple agreements, and are not converted into contracts. His arguments have been sufficiently refuted by Grotius of the rights of war and peace, 2. 2. 1. and Pufendorff of the law of nature and nations, 3. 5. 9. We shall only add, that Connanus speaks not in so high a strain of the natural obligation of bare pacts as the Romans themselves did, who never denied their perfect obligation, tho' they did not grant an *action* upon them for particular reasons \*.

\* According

\* According to the Romans, one was perfectly obliged by a bare pact; and they looked upon him who broke his word with no less contempt than other nations. Besides, they did not think the obligation imperfect which arose from such bare promises as were not confirmed by stipulation, when there was place for compensatio, l. 6. D. de compens. *constituto*, l. 1. § pen. D. de pecun. const. *novatio*, l. 1. fin. D. de novat. *fideijussoribus & pignoribus*, l. 5. D. de pign. *exceptio*, l. 7. § 5. l. 45. D. de pact. l. 10. l. 21. l. 28. C. eodem: Whence even what a promiser paid by mistake, could not be recovered *condictione indebiti*, l. 19. D. de cond. indeb. most of which cases are of such a nature that they can hardly be brought under the notion of imperfect obligation. The Romans only refused to grant an action upon bare pacts, because they had contrived a certain *civil* method which they ordered to be used in agreements or pacts, *viz. stipulation*. Wherefore, as in several countries the laws do not grant an action upon the pawning of immoveable things, unless the pawn be registered in the public acts, and yet these laws do not detract from the perfect obligation of pawn, which exerts itself in other ways; so neither did the Romans think that pacts did not produce a perfect obligation, because they did not grant an action upon bare pacts.

## Sect. CCCXCI.

Express  
and tacite  
pacts.

A pact being the mutual consent of two or more in the same will or desire (§ 386); *i. e.* an *agreement* of two or more about the same thing, the same circumstances; the consequence is, that this internal consent must be indicated by some external sign. But such signs are words either spoken or written, and deeds; the former of which make express, the latter tacite consent (§ 284); and therefore it is the same, whether persons make a pact by express, or by tacite consent, provided the deed be such as is held to be significative of consent by the opinion of all mankind, or of the particular nation\*; nay, consent is sometimes justly inferred, from the very nature of the business, if it be of such a kind, that a person cannot be imagined to dissent (§ 284).

\* Hence

\* Hence by the Roman law, a nod was reckoned consent, l. 52. § ult. D. de obl. & act. Quintilian. declam. 247. Nay, submission and silence were reckoned consent, l. 51. pr. D. locat. l. 11. § 4. 7. D. de interr. in jure fac. and elsewhere, which we likewise admit to be true, unless there be some probable reason why one might, tho' he did not assent, rather choose to be silent, than to testify his dissent by words or deeds, *e. g.* if a son, afraid of a cruel father, being asked by him, whether he would marry Mavia whom he hated, should be silent, he cannot be thought to have consented. For what if a son, when such a father bids him go hang himself, should say nothing, would he therefore be deemed to have consented?

### Sect. CCCXCII.

It is plain from the definition of a pact as requiring consent (§ 391), that they cannot covenant who are destitute of reason, and therefore that the pacts of mad persons are null, unless they were made in an evidently lucid interval from their madness; as likewise the pacts of infants, and of all whose age cannot be supposed capable of understanding the nature of the thing; or of such persons, whose minds are disturbed by their indisposition; or of persons in liquor, even tho' their drunkenness be voluntary\*; or finally, of those who promised any thing to another, or stipulated any thing from another to themselves in jest.

Who can,  
and who  
cannot  
make  
pacts.

\* For tho' in other cases, an action done in drunkenness be imputed to one whose drunkenness was voluntary (§ 50), yet here another sentence must be pronounced, and the degrees of drunkenness must be distinguished. For either the promiser was quite drunk, or only a little in liquor. Now, if he was quite drunk, that could not but be perceived by the party bargaining with him; and therefore, the latter either acted knavishly, or at least he is blameable for covenanting with such a person; so that there is no reason why, when the person has recovered from his drunkenness, such a contractor should have any right to demand the fulfilment of such a promise. But if the person be not quite drunk, his promise must be obligatory, because he



was not quite incapable of judging what and to whom he promised.

## Sect. CCCXCIII.

Of pacts  
made by  
mistake or  
igno-  
rance.

From the same principle it follows, that pacts made thro' ignorance or mistake are invalid, if this fault of the understanding was culpable, vincible and voluntary (§ 107); but not, if it be of such a nature, that the most prudent person is liable to it; (§ 108), as, if the covenanting persons had different persons and objects in their view; or if either of them was mistaken about the person, or object, or any circumstances of it which could not easily be known, and which, had he known, he would not have made the pact\*.

\* By these rules may all the cases be resolved that are usually put upon this head. Thus, for instance, the pact will not be valid, if one promised to espouse a virgin, who is afterwards found to be pregnant, because the most prudent person might have mistaken in this case: Nor is the contract of marriage valid, if Afrania be betrothed to one in mistake, instead of Tullia whom he had in view, but did not know her name; because not having the same person in view, they did not consent to the same thing: In fine, if Tullia after betrothment is found to be Epileptical, or liable to any other hideous disease, the betrother shall not be bound in such a case, because he was ignorant of, or in an error about a circumstance which he could not easily discover, and which, if he had known, it is not probable he would have desired the marriage.

## Sect. CCCXCIV.

Of fraud  
or knave-  
ry.

Much less still is a pact valid if one be led into it by the fraud or knavery of the other; or in which one is involved, and by which one is wronged by another's cunning and deceitfulness; because he cannot be deemed to have consented, who was so blinded or deluded by another's artful misrepresentations, that he had quite a different opinion of the person or object when he covenanted, than he afterwards found

found to be the case \*. On the other hand, there is no reason why a pact should be null when a third person induces one to make it without the other's knowledge, tho' in this case it be indisputable, that the person by whose fraudulence the pact was made, is obliged to repair the damages of the persons whom he hath thus injured:

\* Hence none will say, that Jacob's marriage with Lea was valid by the law of nature, since it was brought about by the fraudulence of Laban, Gen. xxix. 22. Nor was the custom of the country, by which Laban pretended to exculpate himself, sufficient to excuse him, or to oblige Jacob to submit, and suffer himself to be so maliciously deceived by his father-in-law. For that custom was not obligatory; and if it really had been received as a law, Jacob ought to have been pre-admonished of it, and Laban ought not to have promised Rachel to Jacob, but to have acquainted him, who was a stranger, that by the customs in Syria, the younger sister could not be betrothed before her elder sister. This transaction was therefore full of knavery, nor could it have been valid, had it not seemed better to Jacob, who was a stranger, to put up the injury, than to involve himself in an ambiguous suit:

Sect. CCCXCV.

And since nothing can be more repugnant to consent than force and fear; nor can an action be imputed to one, if he was forced to it by one who had no right to force him (§ 109); hence it is clear, that one is not bound by his promise to a robber; or to any one who unjustly uses violence against him. But a pact is not invalid, if it be made with one who had a right to use violence; and much less is a pact null; if not he to whom the promise is made, but a third person, without his knowledge, used violence; or was the cause of the pact \*. Nor is a pact invalid; if the person forced to it, afterwards freely consents and confirms his promise, because he then becomes obliged, not by his first

promise extorted from him by force and fear, but by his after voluntary consent (§ 109).

\* For since imputability ceases, if one be neither the cause nor doer of a thing (§ 105), but in this case, he to whom a promise is made, is neither the author nor cause of the violence by which the other was forced to promise, the violence cannot be imputed to him. Thus, *e. g.* if any person in imminent danger from robbers or pirates, should hire a convoy at a high price, it would be in vain for him to pretend to his convoy, when the hire is demanded, that he promised it in fear of robbers. So Seneca decides the matter, Controv. 4. 27.

#### Sect. CCCXCVI.

The consent of the parties ought to be mutual. Moreover, since a pact consists in the consent of two or more to the same thing (§ 386), it is very plain that this rule must hold not only in bilateral, but likewise in unilateral pacts; and therefore a promiser is not bound, unless the other signify that the promise is agreeable to him. But this may be justly presumed, either from the condition of the person to whom the promise is made; or from the nature of the thing promised; or from antecedent request, provided, in this last case, the same thing that the other had demanded be promised.

#### Sect. CCCXCVII.

What with regard to impossible things.

Again, because pacts are made about something to be performed (§ 386), but impossible things cannot be performed, and therefore the omission of them is imputable to none (§ 115); the consequence is, that pacts about things absolutely impracticable are null: no obligation arises from them, unless the thing, at the time the pact was made, was in the power of the promiser, and he shall afterwards destroy, by his own fault, his power to fulfil his promise; or unless one fraudulently promised a thing not absolutely impossible, but which he knew to be impracticable with regard to him (§ 115).

Sect.

## Sect. CCCXCVIII.

And since those things are justly reckoned <sup>What</sup> among *impossibles*, which, tho' not impossible in <sup>with re-</sup> the nature of things, yet cannot be done a- <sup>gard to</sup> greeably to the laws and to good manners (§ 115); <sup>immoral</sup> things. hence it is evident, that pacts and promises contrary to the laws of justice and humanity, or even to decency, modesty and honour, (and which, for that reason, we ought to be judged not to be capable of doing, as Papinianus most justly and philosophically speaks, l. 15. D. de condit. instit.) are not valid. A person is not obliged to fulfil a promise by which he engaged to commit any crime; nor is he who promised to pay one a reward for perpetrating any crime bound by such a promise; and therefore all pacts about base and dishonest things, whether unilateral or bilateral, are of no effect.

\* For it is manifestly contradictory, that the law of nature should confirm pacts contrary to itself; that it should at the same time prohibit a pact, and command it to be fulfilled; or that a pact should be at one and the same time null, and yet obligatory. And therefore, a pact is departed from without perfidy, which could not be fulfilled without committing a crime. Nor does he deserve the character of faithful, who performs what he cannot do without incurring guilt. And for this reason the nurse gives an excellent answer to Dejanira, when she would have her to promise silence.

*Præstare, fateor, posse me tacitam fidem,  
Si scelere careat, interim scelus est fides.*

Seneca in Herc. Oeteo. Act. 2. v. 480.

## Sect. CCCXCIX.

Hence again we infer, that one is not obliged to <sup>What</sup> perform promises, the fulfilment of which would <sup>with re-</sup> manifestly be detrimental to the other, tho' this o- <sup>gard to</sup> ther should urge the fulfilment of the promise to <sup>detrimen-</sup> his own ruin. For since we are forbid to injure <sup>tal pro-</sup> any person by the law of nature (§ 178), and none <sup>mise.</sup>



can make pacts contrary to the law of nature, (§ 398), no pact by which another is hurt can be valid; and he who keeps such a promise, even to one who insists upon the fulfilment of it, is no less deserving of punishment, than he who hurts one against his will, and by force \*.

\* Nor can the maxim, *volenti non fieri injuriam*, be opposed to this doctrine. For we have already shewn, that this maxim does not take place when it is unlawful to consent. But it is unlawful to consent to what God hath prohibited by right reason, or by his revealed will. For this reason, tho' Saul being wounded, had begged the young man to slay him, yet he was so far from escaping unpunished for consenting to this request, that David ordered him to be put to death as guilty of Regicide, 2 Sam. i. 15, &c.

#### Sect. CCCC.

What  
with re-  
spect to  
pacts a-  
bout the  
deeds and  
things of  
others.

Besides, because we make pacts about those things which we desire to have a perfect right to exact from others (§ 386); but those things can neither be done, nor given, which are not at our disposal, but subject to the dominion of another person; we have therefore reason to deny that one can make a valid pact about things belonging to others, without commission from the owner, or even about his own things, to which any other hath already acquired some right by a prior pact. He indeed who hath engaged to use all his diligence to make another give or do, is obliged to fulfil that promise \*. Yea, he is obliged to answer for the value of it, if he hath engaged himself to get another to give, or do a thing to any one; but he to whom a third person hath made such a promise, hath no right to exact the thing or deed, thus promised to him, from the person to whom it belongs to dispose of it. See Hertius de oblig. alium datur. facturumve.

\* For since he hath promised no more than his help and diligence, the other hath no right to exact more from him.  
And

And in general, as often as one stipulates something to himself, which he knew, or might have known not to be in another's power; so often is the Promissor discharged from his promise, by using all his diligence. This is elegantly expressed by Seneca of benefits, 7. 13. "Some things are of such a nature, that they cannot be effectuated; and in some things it is to do them, to have done all that one could in order to effectuate them. If a physician did all in his power to cure one, he hath done his part. Even tho' a person be condemned, an advocate deserves the reward of his eloquence, if he exerted all his skill. And praise is due to a General, tho' he be vanquished, if he exerted all due prudence, diligence and courage."

# Sect. CCCCI.

From the same principle, that promise to give What  
or do consists in the consent of both parties (§386), with re-  
it manifestly follows, that it depends upon the par-gard to  
ties to make a pact *with*, or *without conditions*, and condition-  
any agreement with regard to *time* they please; and al pacts,  
&c.  
that these circumstances ought to be observed by  
the persons engaging, provided what regards the  
condition truly makes the effect of the pact de-  
pend upon an uncertain event; *i. e.* provided it  
be truly a *condition*. Whence it is plain, that  
what is promised under what is called *an impossible*  
*condition*, is not obligatory, since such an additional  
clause hardly deserves to be termed *a condition* \* :  
and those who have promised or stipulated what  
they foresaw could not be done, must be deemed  
either to have been in jest, or to have been mad :  
in the first of which cases, they must be judged not  
to have consented; and in the other of which they  
must be judged not to have had it in their power  
to have consented (§ 392).

For a condition is a certain circumstance expressed by  
the stipulating parties, by which the effect of the pact is  
suspended, as by an uncertain event. But seeing *impossible*  
does not mean an uncertain event, but an event which it is  
certain cannot happen, it is plain that such a circum-  
stance

stance does not suspend the effect of a pact, and therefore it is not a condition. Miltiades therefore cavilled, when he required the Lemnians to surrender their city according to their pact, because, coming from home he had arrived at Lemnos by a north wind, Nepos, Miltiad. c. 1. and 2. For the Lemnians meant Athens: nor could Miltiades understand the Lemnians in any other sense, since he at that time had no home but at Athens. The condition was impossible, and therefore rendered the pact null; especially seeing the Lemnians might easily have been perceived by Miltiades to have spoken in jest and to banter him.

## Sect. CCCCII.

What  
with re-  
gard to a  
base con-  
dition.

But since base and dishonest things are justly reckoned amongst impossibles (§ 115), and what is promised upon an impossible condition is null and void, (§ 401); and since in general it is unlawful to make pacts about base or dishonest things (§ 398); hence we may justly infer, that base and dishonest conditions render a pact null\*; and that he who promised upon such a condition is not bound to fulfil his promise; but that if it be fulfilled, he is justly liable to punishment for having done a crime; as is the other party likewise, being, by making such a condition, the moral cause of that crime (§ 112).

\* For a particular reason, the Romans held conditions, whether physically or morally impossible, in testaments, as not written, not existing, § 10. Inst. de her. inst. l. 1. l. 19. D. de condit. Inst. l. 8. & l. 20. D. de condit. & dem. For as it seemed absurd to indulge jesting and trifling to a testator in so serious an affair; so neither could the omission of an impossible action be deemed fraud in an heir, since he could never have consented to it (§ 115). And hence by the Roman law they would have got their legacies which were left to them by Eumolpus in Petron. Sat. cap. 91. tho' they had not fulfilled the condition. "All who have legacies by my testament, except my children, shall only have them upon condition that they cut my body into pieces, and eat it up publicly." But since, in our opinion, the law of nature knows no other last-wills beside those which are done by way of pact (§ 291), all that hath been said of pacts is applicable

applicable to last-wills ; so that the law of the Thebans was absurd, which ordered ridiculous conditions to be performed, as that one who had flattered a woman in order to be her heir, should carry her naked corps besmeared with oil upon his shoulders.

*Scilicet elabi si posset mortua, credo,  
Que nimum insliterat viventi.*

Hor. Serm. 2. 5.

Sect. CCCCIII.

Moreover, since one may assist another, or pro-Whether  
mote his advantage by means of a mandate, or by one may  
undertaking his business without a commission<sup>not pro-</sup>  
(\$ 346), we must conclude, that it is the same whe-<sup>mise and</sup>  
ther one promise and make a pact in person, or by ano-<sup>covenant</sup>  
another do it for him by his order. But since he<sup>ther ?</sup>  
who undertakes another's business without a com-  
mission from him, is obliged to manage it to his  
advantage (\$ 348), which he does not do, who is  
liberal of another's goods, and gives any thing of  
another's away without the owner's consent (\$ 400);  
the consequence is, that he who undertakes ano-  
ther's business without a commission, may stipulate  
to that person ; (so that this rule in the Roman law  
is not agreeable to natural equity, "That none can  
stipulate to another, unless he be under subjection  
to him; § 4. Inst. de inut. stip.) but he cannot pro-  
mise for him without his knowledge; and such  
a promise does not bind the owner.

Sect. CCCCIV.

Finally, because, as we observed in the begin-What hath  
ning of this chapter, there is no distinction, by the<sup>been said</sup>  
law of nature, between pacts and contracts, both<sup>of pacts</sup>  
deriving all their subsistence and force from con-<sup>extends</sup>  
sent (385), it is evident, that all the rules which<sup>likewise to</sup>  
have been laid down in this chapter, do no less be-<sup>contracts.</sup>  
long to contracts than to pacts ; and that one does  
not proceed in a wrong method, who deduces the  
nature



nature of contracts from the nature of pacts, and so begins by considering the latter.

## CHAP. XV.

*By what means obligations arising from pacts and contracts are dissolved.*

### Sect. CCCC.V.

General  
axioms.

**W**E have already proved that pacts ought to be religiously fulfilled, and that nothing is more sacred than one's pledged *faith* (§ 387); but by *faith* is meant nothing else but the performance of promises and pacts; (and therefore Cicero de off. 1. 6. justly, tho' not exactly according to etymological rules, says, "Fidem appellatam, quia fiat, quod dictum est.") Hence then we infer, that those who covenant have then attained to their end, when they have satisfied the terms of their covenant, and what was agreed upon is done. But the end (which according to the philosophers, is first in intention, and last in execution) being obtained, or being of such a nature that it cannot be obtained (§ 397), the obligation arising from a promise or pact must cease\*.

\* The civil law distinguishes between the ways by which obligation is removed *ipso jure*, in the nature of the thing, and the ways by which it is taken off by *exception*. When the obligation is cancelled by any deed of the parties contracting, as by paying, compensation, acquittance, &c. then it expires *ipso jure* by the nature of the thing. But if it be dissolved on the account of equity, it is said to be removed by an *exception*. But tho' we do not think this distinction quite idle, or without foundation, (upon which see an excellent dissertation by Hen. Cocceius de eo quod fit ipso jure) yet it will easily be granted to us, not to be of the law of nature, by those who are acquainted with the judiciary affairs of the Romans, and the reason which induced them to make this distinction.

Sect.

Sect. CCCCVI.

Since an obligation arising from a pact or promise ceases when it is fulfilled, and that which was agreed upon is done (§ 405); the consequence is, that it ceases by payment, which is nothing else but the natural performance of the thing promised or agreed upon. But it is the same thing to him who is to be paid, by whom he be paid, provided the thing itself which was owing to him, or, (if it be a consumeable commodity) the equivalent be paid to him (§ 364); because thus the obligation to him is naturally discharged. So, for the same reason, it is evident, that he who is under an obligation by his pact, is not delivered from that obligation when another offers to fulfil it for him, if it be of such a nature as not to admit of being performed by another in his room \*.

\* This happens as often as a person's quality or virtue engaged one to make a pact with him. And therefore, if *Titia* be obliged by contract of marriage to marry *Sempronius*, she is not freed from this obligation, tho' *Sulpicia* should be ever so ready and willing to fulfil the contract in her stead, because *Sempronius* chose *Titia* for her age, her figure, her personal good qualities, and it is not the same to him whom he espouses. On the contrary, to a lender it is the same, whether he receive the book he lent from the person who borrowed it, or from another with whom he had nothing to do: And it is the same to a creditor, whether he receive his money and interest from his debtor, or from a third person unknown to him, because thus the thing in obligation is naturally performed.

Sect. CCCCVII.

From the same principle we infer, that the species is to be restored, if the use or custody only of an inconsumeable thing was granted; and the same in kind and quantity, if the use of a consumeable thing was granted; that one thing cannot be obtruded upon a creditor for another against his will; and

and much less can he be forced to accept of a part for the whole; or to take payment later, or in another place than was agreed upon in the contract \*; because, in all these cases, the thing in obligation is not naturally performed (§ 307). Further, it is plain, from the same principle, that we are to pay to no other but our creditor, provided the laws allow him to receive payment, or to him to whom he has ceded his right, or given commission to receive payment; for otherwise, tho' the thing in obligation is performed, yet it is not fulfilled to him to whom one is debtor by the contract (§ 406).

\* For tho' necessity may require some indulgence to a debtor, and tho' the laws of humanity may often oblige a creditor to remit a little of his rigour, we are here speaking of right; and by it pacts and contracts ought to be punctually and faithfully performed. "For, as Cicero says, Off. 2. 24. nothing cements or holds together in union all the parts of a society, as faith and credit, which can never be kept up, unless men are under a necessity of honestly paying what they owe one to another."

#### Sect. CCCCVIII.

The second way.  
Compensation.

Again, because obligation ceases when a contract is fulfilled, and with respect to consumeable things as much is held for the same (§ 364); the consequence is, that obligation is removed by *compensation*, which is nothing else but balancing debt and credit, both of which have a certain value, one with another \*.

\* There is yet another reason: For since he is paid who gets what was owing to him (§ 406), and he to whom a consumeable thing was owing, gets it when he gets as much (§ 363); it follows, that in such a case, he who any way receives as much as was owing, is paid; and therefore, compensation is but a short way of paying; and it is most reasonable that it should have the same effect as payment.

Sect.

## Sect. CCCCIX.

From the definition of compensation it is plain, <sup>What is just with regard to it.</sup> that it can only take place among those who are mutually owing one to another, and therefore that another's debt to me cannot be obtruded upon my creditor. Compensation has place with respect to consumeable things, which, since they do not regularly admit of price of fancy, have always a certain value; but species cannot be compensated by species, nor a thing of one kind by a thing of a different kind, nor personal performances by like performances, because all these things admit of a price of affection, and are of an uncertain value. In fine, compensation, even by unequal quantities, amounting to the sum, holds good, tho' it does not appear reasonable to desire to compensate a clear debt by one not so clear or contended for\*.

\* Much less does he act justly, who would compensate a clear debt by this consideration, that he hath abstained from injuring his creditor by unjust violence, because in this case plainly there is no mutual obligation. It was therefore a very odd way of compensation by which Vitellius satisfied his creditors, Dion. Cass. Hist. l. 65. p. 735. "When he went into Germany he was so embroiled in debt, that his creditors would scarce dismiss his person upon any security; but a little after, when he was made Emperor, and returned to Rome, they hid themselves. And he ordering them to be brought before him, told them that he had restored them safety for their money, and demanded back the bonds and instruments of contract." As if a robber could reckon it for credit to a traveller, that when he had it in his power to murder him, he had only robbed him, without shedding one drop of his blood.

## Sect. CCCCX.

Moreover, since every one can abdicate his own <sup>A third way, Acquittance.</sup> right (§ 13), an obligation may likewise be dissolved by acquittance or voluntary remission, by which we understand a creditor's voluntary renouncing



ing his right of exacting a debt. And since it is the same whether one manifests his will by words, or other signs (§ 195), it is also the same whether one renounces his right to a debt by words or by deeds, as by giving up, tearing or burning the bond, provided some other intention of the creditor be not evident, or the bond be not destroyed by the creditor, but by another without his order, or be not rather accidentally lost, destroyed or effaced, than by the will of the creditor \*.

\* Thus the Romans might justly say, that their taxes and other fiscal debts were remitted to them, when Hadrian with that design burnt all their bonds and obligations, that by such a stupendous liberality he might win the affections of the people, Spartian. Had. cap. 6. But a debtor would most absurdly conclude so, if his creditor should deliver him his bond in order that it might be drawn up in a new and better form, or if his bond was burnt by accidental fire. And hence we may see, why it hath always been pronounced most iniquitous in the Roman people, for one plunged in debt, *novas tabulas postulare*, i. e., to demand a remission of his debt from the magistrates or tribunes of a turbulent genius. For thus the acquittance came not from the creditors; but from magistrates profuse of what did not belong to them, and whose office and duty it was to render justice to creditors, instead of liberating debtors against the will of creditors. This practice, of most pernicious example, was first put in use by Sylla, Liv. Ep. l. 88. And that Cataline expected the same, and that the people expected the same from Cæsar is manifest, tho' men of that turbulent spirit were then disappointed, Salust. Catil. cap. 21. Cæsar de bello civili, 3. 1. Sueton. Jul. cap. 42. Plutarch. Solon. p. 86.

#### Sect. CCCCXI.

A fourth way. Mutual disagreements.

Moreover, since any one may resign his right, and remit a debt due to him (§ 410), it follows, that both parties in a bilateral contract, may by mutual agreement dissolve their contract, especially, *since nothing is more natural, than that a thing may be dissolved in the way it was formed*, l. 35. D. de reg. jur.

jur. But so, that this manner of dissolving an obligation cannot have place, if the positive laws ordain a contract to be indissolveable: such as matrimony now is amongst Christians, which among the Romans, might, as is well known, be dissolved by consent.

Sect. CCCCXII.

But because the obligation of a bilateral contract <sup>Whether</sup> can only be dissolved by mutual consent (§ 411), <sup>obligation</sup> the will of one of the parties does not dissolve it; <sup>be dissolv-</sup> and therefore the treachery of either party does not <sup>ed by</sup> dissolve the contract, as Grotius of the rights of war <sup>treachery</sup> and peace, 3. 19. 14. and Pufendorff of the law of nature and nations, 5. 11. 9. seem to think. For even he who does not fulfil his part, remains obliged to do it, because he cannot liberate himself by his own single will from an obligation, which can only, as hath been said, be dissolved by mutual consent, and the other has a right to compel him to fulfil his pact; tho' if the latter will not use his right \*, then the obligation ceases on both sides, because it is now removed by the consent of both (§ 411).

\* But either can do that, if the other will not fulfil the pact. For in every bilateral contract, this condition is supposed, that the one is obliged to perform what he promised, if the other performs his part (§ 379). If one therefore does not satisfy his promise, the condition fails upon which the obligation depended (§ 401), and therefore the obligation of both ceases.

Sect. CCCCXIII.

But seeing any circumstance may be added to a <sup>The fifth</sup> pact, and these circumstances must be observed <sup>and sixth</sup> (§ 401), it is evident that an obligation being con- <sup>way. The</sup> ceived *ex die*, i. e. so that what is promised cannot <sup>term elap-</sup> be demanded till a certain day, it cannot be de- <sup>sed, and</sup> manded before that time fixed: But if it be con- <sup>the condi-</sup> ceived *in diem*, within the compass of a certain time, <sup>tion not</sup> then <sup>fulfilled.</sup>

then when that day comes, the obligation is dissolved *ipso jure* \*. And the condition upon which the effect of a pact depended not taking place, obligation is dissolved for the same reason, unless one being ready to fulfil his part of the pact, is hindered either by his party or a third person, without whom the pact could not be fulfilled.

\* Therefore, this rule of the Roman lawyers hath too much of subtlety in it, *viz.* *ex contractu stricti juris non posse ad tempus deberi*, &c. § 3. *Inst. de verb. oblig.* l. 4. *pr. D. de serv.* l. 44. § 1. *D. de obl. & act.*

#### Sect. CCCCXIV.

The seventh manner.

Besides, there are obligations which are contracted with an eye to a certain person, and his qualities; but these are of such a nature, that they cannot be performed by other persons (§ 406): And therefore it is clear, that these obligations cannot pass to heirs and successors, and that they expire with the death of the promiser. Something like this we observed with respect to the obligation of a betrother, and of one who accepteth of a commission or trust. But this way of obligation's being dissolved, does not belong to other obligations, which can be fulfilled out of the goods of the person obliged; because these, as admitting of performance in the room of the person obliged, are justly transmitted to heirs, as we have shewn in its proper place (§ 305).

#### Sect. CCCCXV.

The eighth change of state.

The case is the same, if we are bound to perform any thing as being in a certain state. For it is the same, as if the promise had been made upon condition this state should continue. And therefore the condition failing, the obligation likewise ceases (§ 413:) Thus he who contracted as a manager, his administration being at an end, is no more bound,

bound, the obligation being solely founded upon his state as administrator, l. ult. D. de Instit. act. l. 26. C. de adm. tut. But this is only true of obligations arising from pacts or positive law, and not of those which arise from the law of nature \*.

\* Thus the special duties owing to a city by one as consul, cease so soon as one ceases to be consul. Thus likewise the duties of a son, as far as they proceed from positive law, cease, so soon as the son is no longer under paternal power. But the duties to which the law of nature binds him, such as obedience, reverence, gratitude, remain after emancipation, nor can they be refused to parents by children no longer under paternal power.

## Sect. CCCCXVI.

Moreover, since the obligation ceases if the end <sup>The</sup> be such as cannot be obtained (§ 406), he must be <sup>ninth.</sup> delivered from his obligation who promised the species itself, if it be quite lost by accident, unless he promised it for a certain value, or as it were in part of payment, and the first obligation be not removed by renovation. Besides, since impossibility is no excuse, if one be in fault or delay, it is evident that he ought to bear the loss who is in fault or delay; and therefore, all that was said above concerning the risks in buying and selling takes place and might be repeated here (§ 353).

## Sect. CCCCXVII.

In fine, since one may pay by another (§ 407), <sup>The</sup> and remit an obligation to another (§ 411), and <sup>tenth, no-</sup> parties may depart from a pact by mutual consent, <sup>vation and</sup> and introduce a new obligation, which last kind of <sup>delega-</sup> agreement we called above *a mixed pact* (§ 389), it <sup>tion.</sup> follows, that any one may remit to another his former obligation, and accept a new one from him in its place, which is called *renewal* or *novation*; or if it be about matters subject to contention and dispute, *transaction*, and that a creditor may remit



a debtor, upon condition that another, whom he approves of, be substituted in his place, which is called *delegation*, and that novation ought to be made in exprefs words, or by the most evident signs, and that delegation must be done with the united consent of all concerned in the affair; and, in fine, that there is a great difference between delegation and cession, by which a creditor transfers an action against his debtor to another, without his debtor's knowledge, and against his will.

#### REMARKS on this Book.

Our Author may perhaps be thought by some to have mentioned several cases; as for instance, with regard to alluvion, casting up of islands, &c. which are rather curious than useful. But let me answer to such objections against our Author, (Grotius, Pufendorff, and other writers on the law of nature,) 1. That of as little use as these questions may appear to us, they were not so in other countries, such as Egypt, where, as Strabo observes, Geograph. l. 17. p. 1139. edit. Amst. "They were obliged to be particularly exact and nice in the division of their lands, because of the frequent confusion of boundaries, which the Nile, by its overflowing occasioned, taking from one part, and adding to another, changing the very form and look of places, and entirely concealing those marks that should distinguish one man's property from another's. For which reason, there was a necessity for their often making new surveys, &c." And it is so still in Holland and other countries, in some measure; nay some such cases may and do happen in every country, where there are large and impetuous rivers, &c. 2. But however rarely any such cases may happen, yet as one cannot be an expert, ready natural philosopher, without having run through many possible cases, and determined how gravity, elasticity, or any other physical powers, would operate in these circumstances according to their laws of working; and therefore, such exercise is by no means useless, but highly useful: So for the same reason, one cannot be ready and expert in the moral science, so as to be able readily to determine himself, or advise others how to act upon every emergency, without having practised himself in resolving all, or very many possible cases, *i. e.* in determining what is requisite in such and such cases, in order to do the least harm, and render every one his due. Thus, it is evident, must one prepare himself for being able to judge readily what ought to be the general rules of justice in states with regard to different cases. Thus alone can one prepare himself for judging of cases in enacting, abrogating or mending laws. And indeed the proper way of studying the laws of any particular country, is by comparing them

them all along with the dictates or the laws of nature concerning the same cases, in an orderly way, proceeding from simple to more and more complex cases gradually. Whence it is evident, that one well versed in the knowledge of natural law, can never be at a loss to find out what ought to be the general positive law in certain cases, and how positive law ought to be interpreted in cases, which, tho' not expressly excepted in a law, which must be general, yet are in the nature of things excepted. 3. The same thing holds with respect to the duties of societies, one towards another, for the laws by which particular persons ought to regulate their conduct in all pacts, covenants, bargains or contracts, under whatsoever denominations they are brought by the doctors of laws, are the very rules by which societies ought likewise to regulate their conduct one towards another; societies being, as we shall find our author himself observing afterwards, moral persons. Whence it follows, that the former rules or laws being determined, it cannot be difficult to fix or determine the latter. And indeed our Author having fixed the former in such a manner, that there was almost no occasion to differ from him, and but very little occasion to add to him; in following him while he deduces and fixes the other in the succeeding book, there will be very little need of our adding any remarks, except in the affair of government, that not having been distinctly enough handled by any writer of a system of the law of nature and nations, for this reason that, as we have already had occasion to observe, none of them has ever considered government in its natural procreation, or its natural causes. Nor do I know any author by whom that hath been done but our Harrington, tho', as he himself shews, the principles upon which he reasons were not unknown neither to ancient historians, nor to ancient writers on morals and politics. It will not therefore be a disadvantage to young readers, for whom this translation, with the remarks, is chiefly intended, in order to initiate them into this useful science, if we, upon proper occasions, in the following book concerning the laws of nations, add a few things to set the more important questions about government in a clear light. On this subject, we of this nation, and we only, dare write freely. For our happy constitution is the blessed effect of thinking freely on this matter; and it must last uncorrupted, unimpaired, while we continue to exercise the right to which we owe it: A right without the exercise of which men are not indeed men. For who will say that slaves, who know not the price of liberty, or who know not that they are slaves, deserve to be called men!

*The end of the first book.*



## ERRATA.

**P**Age 44. § 66. l. 7. for *communication* read *commi-  
nation*. p. 61. l. 12. for *another* read *to others*.  
p. 62. l. 9. read *can be*. p. 64. l. 45. for *to him* read  
*to man*. p. 67. l. 15. read *and a*. p. 130. § 184. l. 2.  
read *lays snares*. p. 143. § 203. l. 8. for *is* read *are*.  
p. 176. § 240. l. 2. for *in the property of many* read  
*in the community of many*. l. 3. for *or* read *and*. p.  
190. l. 7. for *the other* read *he*. l. 8. for *to him* read  
*to the other*. l. 10. for *the other* read *him*. p. 199.  
l. 42. for *would* read *could*. p. 214. l. 3. for *money*  
read *pawn*. p. 239. schol. l. 4. for *what* read *which*.  
p. 279. § 361. l. 7. for *or cannot* read *or that he him-  
self cannot*.

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